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Recent Decisions

Court of Appeals of Maryland

I. ATTORNEY MALPRACTICE

A. Facilitating Claims for Legal Malpractice in Maryland

In *Thomas v. Bethea*,[1] the Court of Appeals held that the ordinary standard of negligence applies to legal malpractice actions based on wrongful settlement recommendations.[2] The court further concluded that the measure of damages should be the difference between the actual settlement and the likely recovery if the case had gone to trial.[3] The majority determined that trial courts should measure damages by using the "trial within a trial" method, in which the jury in the malpractice trial is asked to determine what a jury would have awarded had the underlying case been tried.[4] In so ruling, the Court of Appeals made it substantially easier for potential plaintiffs to sue their attorneys successfully for negligently recommending settlement.[5] This decision contravenes the public policy in favor of settlement as a preferred means of resolving disputes by dissuading attorneys from settling cases.

1. The Case.—In August 1981, the petitioner, attorney David Thomas (Thomas), agreed to represent minor Marsharina Bethea (Bethea) and her mother, Gerrine Bethea.[6] Bethea's mother alleged that her daughter had suffered lead paint poisoning from three Baltimore City residences.[7] Thomas filed suit on behalf of Bethea and her mother in the Circuit Court for Baltimore City against the three landlords.[8] Although Thomas served the owners of two of the properties,[9]

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1. 351 Md. 513, 718 A.2d 1187 (1998).
2. *Id.* at 530, 718 A.2d at 1195.
3. *Id.* at 533, 718 A.2d at 1197.
4. *Id.*
5. *See id.* at 541, 718 A.2d at 1201 (Chasanow, J., concurring and dissenting); *see also infra* text accompanying notes 137-140.
6. *See* 351 Md. at 515, 718 A.2d at 1188.
7. *See id.* at 515-16, 718 A.2d at 1188. The residences were, respectively: 209 East Lafayette Avenue, 1322 Myrtle Avenue, and 1217 East Preston Street. *See id.* at 515, 718 A.2d at 1188.
8. *See id.* at 516, 718 A.2d at 1188-89.
9. *See id.*, 718 A.2d at 1188. Thomas served the owners of the respective properties at 209 East Lafayette Avenue and 1322 Myrtle Avenue. *See id.*

he was unable to serve W.H. Groscup and Sons, Inc. (Groscup), the owner of the third property (the Preston Street property).[10]

In December 1983, the two served defendants offered to settle in the amount of $2500, but conditioned the offer on a general release of all three defendants.[11] Allegedly relying upon Thomas's recommendation, Bethea's mother accepted the settlement offer in exchange for her execution of a general release of liability.[12]

In March 1995, almost twelve years after her mother accepted the settlement, Bethea filed suit against Thomas in the Circuit Court for Baltimore City.[13] She alleged that Thomas had failed to "properly investigate, prosecute, and litigate her claim,"[14] and asserted that Thomas's settlement recommendation to her mother was "grossly inadequate to cover the damages."[15] After the Court of Special Appeals's decision in *Prande v. Bell*,[16] Bethea amended her complaint to further allege that Thomas's 1983 settlement "was one that no reasonable attorney, having undertaken a reasonable investigation of the facts and law as would be appropriate under the circumstances, and with the knowledge of the same facts, would have made."[17] Bethea later stipulated that Thomas's violation of the standard of care concerned only his handling of the case as it pertained to Groscup, the third unservable landlord.[18]

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10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* Bethea was presumably able to overcome any statute of limitations objection because she was a minor at the time her injury occurred. *See* MD. CODE ANN., CTS. & JUD. PROC. § 5-201(a) (1984) (allowing a minor to file an action that has already passed the statute of limitations deadline within three years of reaching age of majority).

14. *Thomas*, 351 Md. at 516, 718 A.2d at 1189.

15. *Id.* (internal quotation marks omitted) (citation omitted).

16. 105 Md. App. 636, 660 A.2d 1055 (1995). In *Prande*, the Court of Special Appeals held that

> to state a cause of action for legal malpractice based on a recommendation that a case be, or not be, settled, the plaintiff must specifically allege that the attorney's recommendation in regard to settlement was one that no reasonable attorney, having undertaken a reasonable investigation into the facts and law as would be appropriate under the circumstances, and with knowledge of the same facts, would have made.

Id. at 656, 660 A.2d at 1065.

17. *Thomas*, 351 Md. at 516, 718 A.2d at 1189 (internal quotation marks omitted) (citation omitted).

18. *See id.* ("[H]er contention was not that $2500 was an unreasonable consideration for releasing the owners of the other two properties, but rather that a valuable case against Groscup was surrendered for no compensation at all."). Bethea was presumably contending that Thomas's failure to serve Groscup when he had $300,000 of insurance on his property was the essence of Thomas's negligence. *See id.* at 516-17, 718 A.2d at 1189.

At trial, Bethea presented evidence that her mother had put Groscup on notice of her special vulnerability prior to leasing the Preston Street property by informing him of Bethea's already elevated lead level, and that Groscup had responded by assuring Bethea's mother that the apartment contained no lead-based paint.[19] Bethea also offered evidence that there had been flaking or peeling lead paint at the Preston Street property and that there had been $300,000 of insurance on the property.[20] Bethea's expert witness, C. Christopher Brown, Esquire, testified that the settlement amount to which Thomas had agreed was inadequate, and that Thomas had behaved unreasonably in recommending that Bethea's mother accept such a settlement.[21] Mr. Brown conceded that some mitigating factors might make such a small settlement amount reasonable,[22] but that Bethea's case was a "strong" one that "should not merely [have been] settled for $2,500, but . . . which should [have been] off to a trial for however much the jury determines is an appropriate sum."[23]

Thomas responded that the case against Groscup had been a weak one, due partly to conflicting evidence, and that Bethea's mother herself wanted a settlement.[24] In support of Thomas's assertion that he "got the best settlement possible," his expert witness, George Russell, Esquire, stated that "the settlement made by Mr. Thomas was not only reasonable but because of the problems he had in the case was ultimately a gift because had the case gone to trial he could not have won the case."[25]

In response to the court's request that it resolve a number of specific issues, the jury determined that Groscup had been negligent concerning the hazard posed by the lead paint, that the presence of that hazard was a substantial factor in causing Bethea's injury, and that Thomas's settlement recommendation was one that no reasonable at-

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19. *See id.* at 516-17, 718 A.2d at 1189.

20. *See id.* at 517, 718 A.2d at 1189.

21. *See id.* Mr. Brown asserted that:

> the settlement that was entered into by Mr. Thomas was woefully inadequate in terms of what the . . . reasonable amount would have been in light of the facts of the case and the law applicable to the case; and that as a consequence no reasonable attorney should have entered into such a settlement.

Id. (internal quotation marks omitted).

22. *See id.* According to Mr. Brown, a small settlement amount might be reasonable "if the landlord had no assets or threatened bankruptcy, or if the client herself were in some way irresponsible." *Id.* Mr. Brown asserted that those circumstances were not present in Bethea's case. *See id.*

23. *Id.* (internal quotation marks omitted).

24. *See id.* at 517 n.2, 718 A.2d at 1189 n.2.

25. *Id.* (internal quotation marks omitted).

torney would have made.[26] Moreover, the jury found that a reasonable settlement amount would have been $25,000, and that Bethea had sustained $125,000 in damages resulting from her exposure to lead paint at the Preston Street property.[27] Pursuant to these special verdicts, the court entered judgment in Bethea's favor in the amount of $125,000.[28] Shortly thereafter, the trial court vacated this judgment, granted Thomas's motion for judgment N.O.V. and entered judgment in his favor.[29] The court found that the proper measure of damages "would have been the amount of a reasonable settlement with Groscup in 1983, not the value" of Bethea's claim against the landlord, and determined that Bethea had presented no evidence at trial as to what a reasonable settlement would have been at that time.[30]

In an unreported opinion, the Court of Special Appeals reversed the judgment N.O.V., and reinstated the jury's verdict, awarding Bethea $125,000 in damages.[31] The Court of Special Appeals relied on its prior decision in *Prande v. Bell*, and concluded that evidence of the fair settlement value was unnecessary.[32] The Court of Appeals subsequently granted certiorari to review the Court of Special Appeals's decision.[33]

2. *Legal Background.*—

a. Attorney Malpractice and Settlements in Maryland.—In the 1995 case of *Prande v. Bell*,[34] the Court of Special Appeals considered for the first time in Maryland "whether an attorney may be held liable for malpractice because of allegedly inadequate settlements of personal injury claims."[35] The plaintiff in *Prande* had been involved in two separate motor vehicle accidents and claimed that the other drivers had been at fault in each of them.[36] The plaintiff retained an attorney to represent her in suits against both drivers.[37] Prior to the first case, the plaintiff, relying on her attorney's advice, settled for $7500.[38] Subsequently, and again relying on her attorney's recom-

26. *See id.* at 517, 718 A.2d at 1189.
27. *See id.* at 517-18, 718 A.2d at 1189.
28. *See id.* at 518, 718 A.2d at 1189.
29. *See id.*
30. *Id.*
31. *See id.* at 518, 718 A.2d at 1189-90.
32. *See id.*
33. *See id.* at 515, 718 A.2d at 1188.
34. 105 Md. App. 636, 660 A.2d at 1055 (1995).
35. *Id.* at 639, 660 A.2d at 1056.
36. *See id.* at 641, 660 A.2d at 1057.
37. *See id.*
38. *See id.* at 643, 660 A.2d at 1058.

mendation, the plaintiff settled her suit against the second driver for $3000.[39] The plaintiff subsequently reneged on the settlement with the second driver, but the trial court nonetheless enforced it.[40] The plaintiff then sued her attorney for malpractice for recommending the two settlements.[41] The circuit court granted all of the defendants' summary judgment motions on the basis of nonmutual collateral estoppel,[42] reasoning that the plaintiff had agreed to the settlements with the tort defendants, and therefore was precluded from relitigating those claims against her attorneys.[43]

The Court of Special Appeals reversed the judgment of the circuit court and remanded the case for further proceedings.[44] In its opinion, the court recognized that no other jurisdictions have applied collateral estoppel to a legal malpractice action against an attorney in the context of an earlier settlement.[45] The court concluded that

> [w]hen a client sues a lawyer for malpractice resulting from the settlement of an earlier claim and the issue of the attorney's negligence was not decided in the earlier adjudication, the party claiming the malpractice has not been given a fair opportunity to be heard on the issue of the attorney's negligence.[46]

The court determined that it would violate public policy to allow attorneys to rely on collateral estoppel in this context, explaining that "[i]t would be patently unfair to allow attorneys who may have committed malpractice in handling a case to turn around and rely on a defense that effectively says that, because the client knowingly settled his or

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39. *See id.* at 644, 660 A.2d at 1059.

40. *See id.* at 644-45, 660 A.2d at 1059.

41. *See id.* at 645, 660 A.2d at 1059.

42. Traditional collateral estoppel principles dictate that a party may be estopped from relitigating an issue that has been determined by a valid final judgment. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 100A, at 724 (5th ed. 1994). Nonmutual collateral estoppel allows a new party to invoke collateral estoppel against a party who had previously litigated and lost on a particular issue in a prior action. *See id.* § 100A, at 726-29. For many years, the general rule was that mutuality was required, *i.e.*, that the only parties who could invoke collateral estoppel were those involved in the action in which the issue was initially decided. *See id.* § 100A, at 728. A number of jurisdictions, however, abandoned the nonmutuality principle following the landmark California decision of *Bernhard v. Bank of America National Trust & Savings Ass'n*, 122 P.2d 892 (Cal. 1942). *See* WRIGHT, *supra*, § 100A, at 729.

43. *Prande*, 105 Md. App. at 646, 660 A.2d at 1060.

44. *Id.* at 661-62, 660 A.2d at 1067.

45. *See id.* at 648-52, 660 A.2d at 1061-63 (discussing cases from New York, New Jersey, Michigan, Pennsylvania, and South Carolina, and citing cases from Oregon, Alabama, Connecticut, Florida, Illinois, Louisiana, Massachusetts, and Missouri).

46. *Id.* at 652, 660 A.2d at 1063.

her case, the issue of whether the attorney was negligent was also settled."[47] Noting, however, that "there will, of necessity, be a range for honest differences of opinion in making settlement recommendations," the court concluded that "[a] recommendation to settle or not to settle on particular terms is not malpractice simply because another lawyer, or even many other lawyers, would not have made the same recommendation under the alleged circumstances."[48]

Because of the concern about lawyers being afraid to settle for fear of possible malpractice suits, the court adopted a heightened standard for finding malpractice in the context of allegedly negligent settlement.[49] The court held that "the plaintiff must specifically allege that the attorney's recommendation in regard to settlement was one that no reasonable attorney, having undertaken a reasonable investigation into the facts and law as would be appropriate under the circumstances, and with knowledge of the same facts, would have made."[50]

b. Attorney Malpractice in the Context of Settlement in Other Jurisdictions.—A number of courts from other states have considered the issue of whether a client may sue his or her attorney for recommending a settlement that is later determined to be disadvantageous. Most courts have concluded that a client may sue his or her attorney in malpractice for negligently recommending settlement but have declined to adopt the heightened negligence standard enumerated in *Prande*.[51] Also, the defense of nonmutual collateral estoppel has been

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47. *Id.* at 654, 660 A.2d at 1064.

48. *Id.* at 656, 660 A.2d at 1065.

49. *See id.*

50. *Id.*; *see also supra* notes 133-134.

51. *See, e.g.*, Brooks v. Brennan, 625 N.E.2d 1188, 1195 (Ill. App. Ct. 1994) (holding that a plaintiff who has settled his or her underlying case may file a malpractice action "where it can be shown that the plaintiff had to settle for a lesser amount than she could reasonably expect without the malpractice"); Cook v. Connolly, 366 N.W.2d 287, 291-92 (Minn. 1985) (concluding that "[the] plaintiff's malpractice action is not limited to instances where the results in the minor's personal injury action were the result of fraud on the part of the minor's attorney" and that a prior court approved settlement did "not make this malpractice suit different from any other malpractice action on the standard of conduct required of the defendant attorney"); Baldridge v. Lacks, 883 S.W.2d 947, 952 (Mo. App. 1994) (declining to adopt a "bright line" rule in cases where plaintiffs present "submissible case[s] of negligence" involving a settlement); Schaefer v. Manfredi, 549 N.Y.S.2d 59, 60 (N.Y. App. Div. 1989) (deciding that "[a] cause of action for legal malpractice is viable despite the plaintiff's settlement of the underlying action where such settlement was compelled because of the mistakes of the defendant, the plaintiff's former counsel" (internal quotation marks omitted) (quoting Cohen v. Lipsig, 459 N.Y.S.2d 98 (App. Div. 1983))).

rejected by nearly all the courts in which that defense has been raised.[52]

Pennsylvania is the only jurisdiction that has not permitted a malpractice action against an attorney based on negligence in recommending settlement.[53] The Pennsylvania Supreme Court case that rejected this type of suit, *Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick*,[54] involved plaintiffs who retained a law firm in a medical malpractice action for the death of their infant son following surgery.[55] After agreeing to a $26,500 settlement, the plaintiffs changed their minds, but the trial court upheld the settlement.[56] The plaintiffs then filed suit against their lawyers, alleging fraudulent misrepresentation, fraudulent concealment, nondisclosure, breach of contract, negligence, and outrageous conduct.[57] In the opinion, the Pennsylvania Supreme Court asserted that nonmutual collateral estoppel did not bar the suit, but found that public policy dictated against it.[58] The court determined that only a settlement procured by fraud could serve as the basis for attorney malpractice in settlement.[59] The

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52. *See, e.g., Cook*, 366 N.W.2d at 290-91 (concluding that collateral estoppel does not apply, as the issues before the court were not adjudicated in the underlying claim); Baldridge v. Lacks, 883 S.W.2d 947, 951 (Mo. App. 1994) (reasoning that because specific issues had not been litigated in the underlying action, "defendants' argument of collateral estoppel does not satisfy the threshold requirement that the issues be identical"); Ziegelheim v. Apollo, 607 A.2d 1298, 1305 (N.J. 1992) (determining that collateral estoppel should not preclude a legal malpractice action from proceeding because "[t]he fact that a party received a settlement that was 'fair and equitable' does not necessarily mean that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent"); Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick, 587 A.2d 1346, 1348 (Pa. 1991) (finding that "it is . . . evident that the matter is not barred by the doctrine of collateral estoppel," because the issues in the subsequent legal malpractice action have not been previously litigated in the underlying action). Other courts have rejected the defense of nonmutual collateral estoppel for the same reason the *Prande* court rejected it. The malpractice suit is based upon the attorney's alleged negligence, which usually is not an issue at all in the underlying case that was settled. *See, e.g.*, Lowman v. Karp, 476 N.W.2d 428, 429 (Mich. Ct. App. 1991); King v. Jones, 483 P.2d 815, 818 (Or. 1971); Titsworth v. Mondo, 407 N.Y.S.2d 793, 797-98 (Sup. Ct. 1978).

53. *See* Lynn A. Epstein, *Post-Settlement Malpractice: Undoing the Done Deal*, 46 CATH. U. L. REV. 453, 453-54 (1997) (observing that "[i]n every state except Pennsylvania, a client is permitted to proceed with the theory that his attorney negligently negotiated an agreement despite the fact that his client consented to settlement").

54. 587 A.2d 1346 (Pa. 1991).

55. *Id.* at 1347.

56. *See id.* at 1347-48.

57. *See id.* at 1348.

58. *Id.*

59. *Id.* The court stated:

> [W]e will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show

court reasoned that this conclusion was necessary in light of the "strong and historical public policy of encouraging settlements."[60] The court explained that allowing such suits would "create chaos in [the] civil litigation system" because lawyers would be reluctant to settle cases for fear of being sued.[61]

As noted, the *Muhammad* decision is only followed in Pennsylvania;[62] other jurisdictions have rejected the *Muhammad* approach.[63] For example, in *Ziegelheim v. Apollo*,[64] the New Jersey Supreme Court stated that

> [a]lthough we encourage settlements, we recognize that litigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks.[65]

The New Jersey court determined that frivolous claims made by disgruntled clients did not present a compelling concern, because any potential plaintiffs "must allege particular facts in support of their claims of attorney incompetence and may not litigate complaints containing mere generalized assertions of malpractice."[66]

The Connecticut Supreme Court similarly rejected *Muhammad* in *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*.[67] *Grayson* involved a

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> he was fraudulently induced to settle the original action. An action should not lie against an attorney for malpractice based on negligence and/or contract principles when that client has agreed to a settlement. Rather, only cases of fraud should be actionable.

Id.

60. *Id.* at 1349.

61. *Id.*

62. *See supra* notes 50-52 and accompanying text.

63. *See* Baldridge v. Lacks, 883 S.W.2d 947, 952 (Mo. Ct. App. 1994) (stating that the language in *Muhammad* transcends "the proposition that settled cases should not be readily revisited. In essence, defendants ask us to grant attorneys immunity from civil liability in cases where their clients have settled, absent some affirmative misrepresentation or fraud by the attorney."); McWhirt v. Heavey, 550 N.W.2d 327, 334-35 (Neb. 1996) (stating that the court's decision to decline adopting a rule that would insulate attorneys from negligence arising from their settled cases "is in accord with the majority of jurisdictions that have addressed this issue"); Malfabon v. Garcia, 898 P.2d 107, 109 (Nev. 1995) (rejecting the rationale espoused in *Muhammad*, and asserting that "the standard of proof should be simple negligence when an attorney is sued by a client, even if the client has approved and consummated a settlement"); Ziegelheim v. Apollo, 607 A.2d 1298, 1304 (N.J. 1992) (rejecting the "severe rule" espoused by the Pennsylvania Supreme Court in *Muhammad*).

64. 607 A.2d 1298 (N.J. 1992).

65. *Id.* at 1304.

66. *Id.* at 1306.

67. 646 A.2d 195, 199 (Conn. 1994).

plaintiff who sued the attorneys who had represented her in a divorce.[68] She alleged that her attorneys had failed to prepare properly her case, which resulted in her agreeing to a settlement that did not reflect her legal entitlement.[69] The Connecticut Supreme Court affirmed a jury award of $1,500,000 in her malpractice action against her attorneys.[70] In so doing, the court refused to "adopt a rule that promotes the finality of settlements and judgments at the expense of a client who, in reasonable reliance on the advice of his or her attorney, agrees to a settlement only to discover that the attorney had failed to exercise the degree of skill and learning required of attorneys in the circumstances."[71] The court explained that although settlements were to be encouraged, lawyers must be held to the same standard of care with respect to settlements as with other legal tasks.[72] The court noted that because settlements are often in the best interest of clients, it was doubtful that attorneys would be unwilling to recommend them simply because of the possibility of future litigation.[73] The court also rejected the defendant attorneys' "prediction of a dramatic increase in legal malpractice claims by parties . . . who, after judgments, have become disenchanted with settlement agreements negotiated by their attorneys," reasoning that its decision had not created any "new claim or theory of recovery," but had simply refused "to narrow the existing common law remedy for attorney malpractice."[74]

c. Measure of Proof and Damages.—In evaluating Bethea's claim against Thomas, the *Thomas* majority analyzed the measure and proof of damages that flowed from Thomas's negligence in recommending settlement. In *Thomas*, Bethea based her case against Thomas upon Thomas's wrongful settlement recommendation—"that, upon his recommendation, a valuable case against Groscup was given away for no recompense."[75] Consequently, Thomas only sought as damages "the amount she likely would have recovered from Groscup had the case proceeded to trial—the difference between that amount and zero."[76] As the *Thomas* court noted, practical difficulties necessitate plaintiffs like Bethea to frame their cases in precisely this

68. *Id.* at 198.
69. *See id.*
70. *See id.* at 209.
71. *Id.* at 199.
72. *Id.*
73. *Id.* at 200.
74. *Id.*
75. *Thomas*, 351 Md. at 531, 718 A.2d at 1196.
76. *Id.*

fashion—"to assert that, given the inadequacy of the settlement offer, the lawyer should have recommended that the offer be rejected and that the litigation be pursued to adjudication."[77] In fact, the court observed that this approach is the one that courts most commonly take.[78] Furthermore, that approach is often implemented "through what has become known as a trial within a trial, or a suit within a suit, i.e., litigating before the malpractice jury the underlying case that was never tried."[79]

When a plaintiff uses the trial with a trial approach, he or she must recreate the underlying action.[80] Thus, as the Fourth Circuit has noted, with the trial within a trial method, "a plaintiff in a legal malpractice action is given the opportunity to litigate before the malpractice jury the underlying case as it would have been tried in the absence of the attorney's negligence."[81] When courts use this approach, "[t]he malpractice jury decides what the client should receive from adjudication of the underlying claim, and the client's damages are the difference between that amount and the amount accepted at settlement."[82] Numerous commentators have criticized the trial within a trial method on public policy grounds.[83]

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77. *Id.*

78. *Id.*

79. *Id.*

80. Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 WASH. L. REV. 1479, 1480-81 (1986) (stating that "[m]ost courts determine whether a claim is actionable by the trial-within-a-trial method whenever the client's claim is based on an attorney's negligence regarding litigation"). With the trial-within-a-trial method, "the client's cause of action depends on the resolution of the underlying action for which the attorney-client relationship was formed. The reasoning is that if the result of the action would have been the same, the client suffered no injury due to the attorney's negligence." *Id.*

81. Briggs v. Cochran, No. 98-2439, 1999 WL 1208420, at *3 (4th Cir. Dec. 7, 1999).

82. *Id.* at *4.

83. *See Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1557, 1568-69 (1994) [hereinafter *Developments in the Law*] (observing that the trial within a trial approach's inherent complexity "may discourage clients from suing their lawyers," and also that this approach potentially allows "an attorney's negligence to shield him from malpractice liability"); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 148-50 (1995) (questioning the merits of the trial within a trial approach because "aside from its expense, the doctrine gives a client the task of litigating a former case against the client's own former lawyer, who knows the strengths and weaknesses of the case, perhaps from the client's own confidences"); Lord, *supra* note 80, at 1480-85 (describing how the trial within a trial approach works and asserting that "dissatisfied courts have struggled with [this] method, partly because of the impossibility of accurate reconstruction, and partly because of the client's difficult burden of proof"); Melissa A. Thomas, *When is an Attorney's Breach of Fiduciary Duty in Missouri Not Legal Malpractice?*, 63 MO. L. REV. 595, 600-01 (1998) (noting that a client's recovery may be denied, irrespective of how egregious the attorney's wrong may have been, "if the attorney can establish that the claimant would not have been successful on the underlying claim").

3. The Court's Reasoning.—In affirming the Court of Special Appeals's decision, the Court of Appeals held that it would "join the chorus of States that have rejected *Muhammad*" and allow a cause of action against lawyers for negligently recommending settlement.[84] The *Thomas* court held that a traditional standard of negligence should apply in actions based on professional negligence,[85] and that the measure of damages should be assessed by using the trial within a trial method, "i.e., litigating before the malpractice jury the underlying case that was never tried."[86]

a. Attorneys' Liability for Negligently Recommending Settlement.— The *Thomas* majority then noted that the *Prande* decision was not unique, as most courts that had considered the issue have also concluded that a client may sue their attorney for negligently recommending settlement.[87] Furthermore, according to the majority, these courts also decided two important sub-issues.[88] First, that nonmutual collateral estoppel did not constitute a defense to these types of suits.[89] Also, that concern over the effect such suits would have on the willingness of attorneys to settle, although legitimate, could not "override the application of well-established principles of tort law."[90] The *Thomas* court also noted that other issues such as the proper measure of damages, the nature of proof required, and need for expert testimony "are doubting, but have not proved insurmountable."[91]

The *Thomas* court next pointed out that of all of the jurisdictions that had considered the issue only a few declined to permit an action against an attorney based on a negligent settlement recommendation.[92] Of these, the most notable was Pennsylvania.[93] The court

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84. *Thomas*, 351 Md. at 529, 718 A.2d at 1195.

85. *Id.* The court asserted that "we see no reason to adopt any heightened standard of negligence." *Id.*

86. *Id.* at 533, 718 A.2d at 1197.

87. *Id.* at 520, 718 A.2d at 1191.

88. *Id.*

89. *See id.* at 521, 718 A.2d at 1191 (explaining that a "malpractice suit does not constitute a collateral attack on the settlement itself . . . which remains unaffected by a verdict for or against the attorney").

90. *Id.* at 521-22, 718 A.2d at 1191 (noting that other courts have used reasoning similar to that of the *Prande* court in that "they have treated the negotiation and recommendation of settlements much the same as other legal work done by an attorney and have concluded that a lawyer may be held liable, at least under some circumstances, if the recommendation is the product of professional negligence and the client can prove harm").

91. *Id.* at 523, 718 A.2d at 1192.

92. *See id.* at 524, 718 A.2d at 1192.

93. *See id.* (citing Muhammed v. Strassburger, McKenna, Shilobod, and Gutnik, 587 A.2d 1346 (Pa. 1991)); *see also supra* notes 54-61 and accompanying text.

noted, however, that not only was Pennsylvania in the minority, but many courts had expressly rejected the Pennsylvania approach.[94]

Looking to the elements of attorney malpractice in Maryland,[95] the court concluded that "[t]here is nothing extraordinary about applying . . . [these principles] to an attorney's recommendation regarding the settlement of a dispute in, or susceptible to, litigation."[96] The court reasoned that because of the statistical likelihood of settlement in any particular case, clients "rely heavily on their lawyer's recommendation regarding settlement, expecting that the lawyer has a sufficient understanding of the relevant facts, law, and prospects to make an intelligent recommendation."[97] The court, however, refused to adopt the heightened standard of negligence expressed in *Prande*, explaining that a traditional negligence standard, requiring "ordinary care and diligence . . . to a fair average degree of professional skill and knowledge" would be sufficient.[98]

b. Measure and Proof of Damages.—In deciding the proper measure of damages to be awarded, the court first considered and rejected Thomas's argument that damages should have been limited to the difference between a reasonable value and the actual settlement obtained.[99] The court stated that his formulation would be appropriate in cases where the plaintiff client alleges that had the defendant attorney performed with "reasonable skill, judgment, and diligence," that the "defendant in the underlying case would and could have settled for substantially more.[100] In this case, however, the court noted that the plaintiff had alleged, instead, that "given the inadequacy of the settlement offer, the [defendant] lawyer should have recommended that the offer be rejected and that the litigation be

94. *See Thomas*, 351 Md. at 525, 718 A.2d at 1193.

95. The *Thomas* court observed that "a former client may have an action against a lawyer if the client can prove (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) loss to the client proximately caused by that neglect of duty." *Id.* at 528-29, 718 A.2d at 1195 (citing Flaherty v. Weinberg, 303 Md. 116, 128, 492 A.2d 618, 624 (1985)).

96. *Id.* at 529, 718 A.2d at 1195.

97. *Id.*

98. *Id.* at 529-30, 718 A.2d at 1195 (quoting Kendall v. Rogers, 181 Md. 606, 611, 31 A.2d 312, 314 (1943)). In support of this determination, the *Thomas* majority pointed to similar conclusions reached by courts in other states and noted that it was "aware of no indication that [the application of a traditional negligence standard to these types of suits] has caused any significant problem." *Id.*

99. *See id.* at 531-33, 718 A.2d at 1196-97.

100. *Id.* at 531-32, 718 A.2d at 1196.

pursued to adjudication."[101] Thus, "when so framed, the measure of damages necessarily becomes the difference between what was accepted in settlement and what likely would have been received from the adjudication."[102]

The court further determined that the ordinary way to implement this approach is to have a trial within a trial—"litigating before the malpractice jury the underlying case that was never tried."[103] Although the court recognized that the trial within a trial method has been widely criticized on a variety of grounds, the court nonetheless observed that "[t]he courts have not seemed eager to adopt any of the alternatives . . . so the trial within a trial approach continues to be used," and concluded that "it was not an inappropriate method in this case."[104]

The court determined that prevailing under this method required Bethea to prove five elements.[105] They were the following:

> (1) that Thomas was negligent in recommending acceptance of the settlement; (2) that Groscup could have been served within a reasonable time in order to permit the action to proceed against it; (3) that Groscup was liable to Marsharina under a theory pled in the complaint against it and had no exculpating defense to the action; (4) that Marsharina suffered compensable injury; and (5) the amount of damages that (i) would have been award by the jury had the case against Groscup proceeded to trial, and (ii) would have been collectible with reasonable effort.[106]

Although Thomas indicated that there was no evidence suggesting what a reasonable settlement with Groscup would have been, or even any evidence that a reasonable settlement could have been reached, the court found that the testimony of Bethea's expert witness "sufficed to support the jury's determination that no reasonable attorney would

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101. *Id.* at 532-33, 718 A.2d at 1197. The court recognized that this position was a more common approach for plaintiffs in these types of suits, because of the "practical difficulties in establishing the reasonable prospect of a better settlement." *Id.* at 532, 718 A.2d at 1197.

102. *Id.* at 533, 718 A.2d at 1197.

103. *Id.*

104. 351 Md. at 534, 718 A.2d at 1197; *see also* Briggs v. Cochran, No. 92-2439, 1999 WL 1208420, at *4 (4th Cir. Dec. 7, 1999) (discussing the use of the trial within a trial approach in *Thomas*, and finding that "[a] 'trial within a trial' is arguably appropriate in cases like *Thomas* in which the attorney's negligence completely forecloses the client's claim from proceeding to adjudication").

105. 351 Md. at 534-35, 718 A.2d at 1197-98.

106. *Id.*

have recommended acceptance of the settlement . . . and that the case should have proceeded to trial."[107]

e. Judges Chasanow's and Cathell's Concurring and Dissenting Opinion.—In a concurring and dissenting opinion, Judge Chasanow, joined by Judge Cathell, agreed with the majority holding that the negligent recommendation of a settlement can serve as the basis for a legal malpractice suit.[108] Judge Chasanow, however, disagreed with the majority on the appropriateness of the trial within a trial method for determining the amount of damages.[109] Judge Chasanow indicated that he would have affirmed the $25,000 verdict for reasonable settlement value.[110] Judge Chasanow pointed out that it was far from certain that Bethea would prevail in a trial against her former landlord and "[t]hus, the most the plaintiff lost by settling was not the full trial recovery against the landlord but the less than 100% probability of prevailing multiplied by the likely damages."[111] Judge Chasanow noted that any award must take into account the chance that the plaintiff would not have won and the concomitant costs saved by not going to trial.[112]

Judge Chasanow also asserted that the trial within a trial method "permits irrelevant and highly prejudicial evidence to serve as a basis for the jury's findings."[113] In other words, to prevail in such an action, the plaintiff must call other attorneys to testify both about the probability of winning the underlying case as well as the inadequacy of the settlement.[114] Judge Chasanow pointed out that such testimony would certainly influence the jury in a highly prejudicial way, for such testimony is intrinsically speculative.[115]

Judge Chasanow further criticized the trial within a trial approach because it allows any statements that the attorney previously

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107. *Id.* at 535, 718 A.2d at 1198 (stating "that determination, especially when based on the heightened standard of liability enunciated in *Prande v. Bell*, amounted to a determination of negligence on the part of Mr. Thomas").

108. *See id.* at 536, 718 A.2d at 1198 (Chasanow, J., dissenting and concurring).

109. *See id.* ("Lawyers too are entitled to justice when they are parties to litigation and I cannot think of a more unjust and unfair procedure than the 'trial within a trial' procedure . . . ." (internal footnote omitted)).

110. *Id.* at 537, 718 A.2d at 1199.

111. *Id.*

112. *Id.*

113. *Id.* at 538, 718 A.2d at 1199.

114. *See id.* (explaining that calling other attorneys to testify about the plaintiff's likelihood of prevailing in the underlying case "will obviously influence the jury in their 'trial within a trial' deliberations").

115. *Id.*

made to his or her client to be introduced into evidence as admissions by a party opponent.[116] Judge Chasanow concluded:

> It seems absurd to have a trial within a trial where a plaintiff's declaration and ad damnum clause can be used to prove the plaintiff's liability and damages, and this is in addition to allowing expert attorney witnesses to tell the jury their assessment of liability and their opinion as to what a reasonable damage award should be.[117]

Moreover, Judge Chasanow disagreed with the use of an ordinary, rather than a heightened, standard in malpractice actions for negligent settlement recommendations.[118] He implied that using the ordinary negligence standard, combined with the trial within a trial approach, to prove an attorney's negligence "seems absurd . . . . This Court would not permit any other class of tort defendants to be judged as unfairly as it permits attorneys to be judged in legal malpractice cases."[119]

Finally, Judge Chasanow lamented that the majority's decision allows disgruntled plaintiffs two bites at the apple. Judge Chasanow opined that a plaintiff who has followed his or her attorney's advice to settle a claim can simply find another attorney willing to state that such an inadequate settlement should not have been recommended.[120] At that point, the plaintiff can file a claim against the former attorney, seeking the verdict value of the underlying case while avoiding the risks and costs inevitably associated with a trial.[121] Rather than characterizing this approach as a trial within a trial, Judge Chasanow conceded that it should appropriately be called "a debacle within a trial."[122]

4. Analysis.—The Court of Appeals in *Thomas v. Bethea* determined that the traditional negligence standard applicable to profes-

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116. *See id.*, 718 A.2d at 1199-1200 (noting that under the trial within a trial method, "since the plaintiff's former attorney is now a party defendant, the pleadings filed by the attorney on behalf of the plaintiff and the prior optimistic statements and high damage estimates made by the attorney on behalf of the plaintiff are now admissions by a party-opponent").

117. *Id.* at 538-39, 718 A.2d at 1200.

118. *See id.* at 538-39, 542, 718 A.2d at 1200, 1201.

119. *Id.*

120. *Id.* at 541, 718 A.2d at 1201.

121. *Id.* In the action against his or her former attorney, the plaintiff "can use the declaration filed by the attorney, the letters written to the insurance adjuster, the initial settlement demands and all the positive things the attorney told the client about the case as admissions to prove liability and damages." *Id.*

122. *Id.* at 542.

sional negligence actions, rather than the heightened standard enunciated in *Prande,* is the appropriate one for actions alleging that an attorney negligently recommended an inadequate settlement.[123] The court also found that the controversial trial within a trial approach should be used to determine liability and damages.[124] In so ruling, the *Thomas* majority may have unwittingly ushered in a flood of frivolous litigation.

a. The Proper Measure of Damages.—Courts have stated that "[t]he fundamental goal of tort recovery is compensation of the victim, i.e., to put the victim, insofar as money damages may do so, in the position he would have been absent the tort," yet have cautioned that "on the other hand, the law will not put an injured party in a better position than he would have been in had the wrong not been done."[125] At trial, the jury determined that a reasonable settlement amount would have been $25,000.[126] Accordingly, Bethea should not have been awarded more than this amount.[127] Furthermore, the Court of Appeals has long held that a plaintiff may not recover for damages "which are speculative or conjectural."[128] The jury's verdict finding that the reasonable settlement amount would have been $25,000 seemed to be based more upon speculation than upon evidence.[129] Indeed, the trial court noted that the verdict was "a verdict based on speculation and conjecture concerning values thirteen years

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123. *Id.* at 529, 718 A.2d at 1195.

124. *See id.* at 534, 718 A.2d at 1197.

125. *E.g.,* Tucker v. Calmar S.S. Corp., 356 F. Supp. 709, 711 (D. Md. 1973); *see also* Tidewater Oil Co. v. Spoerer, 125 A. 601, 602 (Md. 1924) (stating that a tort victim is entitled to compensatory damages, but that "in no case should the injured party be placed in a better position than he would be had the wrong not been done"); Weishaar v. Canestrale, 241 Md. 676, 685, 217 A.2d 525, 530 (1966) (asserting the general principle that "[d]amages are supposed to compensate the injured person for the wrong which has been done him" (citation omitted)).

126. *See Thomas,* 351 Md. at 518, 718 A.2d at 1189.

127. *See* Petitioner's Brief at 14, Thomas v. Bethea, 351 Md. 513, 718 A.2d 1187 (1998) (No. 7) (arguing that to award Bethea more than $25,000 would put her in a better position than "[s]he would have been in had the wrong not been done" (alteration in original) (internal quotation marks omitted) (quoting *Tucker,* 356 F. Supp. at 711)).

128. Pickett v. Haislip, 73 Md. App. 89, 104 (1987); *see also* McAlister v. Carl, 233 Md. 446, 455, 197 A.2d 140, 145 (1964) (considering compensatory damages in the context of loss of enjoyment, and conceding that there are "numerous cases in which the court has held that purely speculative damages are not recoverable"); *Weishaar,* 241 Md. at 685, 217 A.2d at 531 (agreeing with the principle that compensation should not be provided where it is "so speculative as to create danger of injustice to defendant").

129. *See* Petitioner's Brief at 32, *Thomas* (No. 7) (contending that the jury's verdict was based on speculation and conjecture, thus flying in the face of Maryland law).

after the trial of the underlying action."[130] As such, the court's decision appears to be a countenance damage awards contrary to established Maryland law.

b. The Thomas *Ruling and its Potential for Discouraging Settlement.*—The Court of Special Appeals first recognized a cause of action in Maryland for negligent settlement in *Prande v. Bell.*[131] In *Prande,* the court conceded that malpractice actions involving negligent settlement are fundamentally different than other actions for legal malpractice because settlement recommendations depend upon a lawyer's overall judgment and experience, which differs from lawyer to lawyer.[132] The court therefore realized that there would be a necessary range for honest differences of opinion in settlement recommendations.[133] Due to these concerns, the court established a heightened standard for plaintiffs who base their malpractice actions on an allegedly negligent recommendation to settle.[134] The *Prande* court ostensibly set this higher standard for plaintiffs in an attempt to protect attorneys' legitimate judgment calls as well as to prevent the courts from being overwhelmed by new cases against attorneys. The *Prande* court's concern was well taken. In his dissent in *Thomas,* Judge Chasanow added his own cautionary note about the method used in such actions when he chose to characterize the "trial within a trial" approach as "a debacle within a trial."[135] The *Thomas* majority's decision has the potential to result in chaos in the courts.

As indicated above, the Court of Special Appeals indicated, in *Prande v. Bell,* that permitting legal malpractice claims following a plaintiff's acceptance of a settlement could be problematic, for lawyers might be increasingly hesitant to settle claims when doing so would expose them to malpractice suits.[136] The decision of the *Thomas* majority unwisely allows plaintiffs to seek the verdict values of claims in actions for negligent settlement. In so ruling, the *Thomas*

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130. Bethea v. Thomas, No. 95079017/CL194080, at 6 (1997) (Circuit Court for Baltimore City).

131. Prande v. Bell, 105 Md. App. 636, 656, 660 A.2d 1055, 1065 (1995).

132. *See id.* (observing that the process of negotiating settlements is inherently subjective and inevitably requires an attorney to make judgment calls).

133. *See id.* at 656, 660 A.2d at 1065.

134. *Id.*

135. *Thomas,* 351 Md. at 542, 718 A.2d at 1201. Judge Chasanow stated that "this Court would not permit any other class of tort defendants to be judged as unfairly as it permits attorneys to be judged in legal malpractice cases." *Id.*

136. *Prande,* 105 Md. App. at 655, 660 A.2d at 1064 (acknowledging the concerns of the *Muhammad* court).

court's ruling is likely to have the chilling effect that the Court of Special Appeals forecasted in *Prande*.

As Judge Chasanow indicated in his separate concurrence and dissent, "[a]ny attorney who has ever settled a plaintiff's case or contemplates settling a plaintiff's case should carefully read the majority's opinion."[137] Judge Chasanow's warning is both sobering and well taken, for the *Thomas* ruling allows plaintiffs two bites at the apple. After *Thomas*, any plaintiff who has settled his or her claim would subsequently be able to sue his or her attorney by alleging that such a settlement recommendation was unreasonable. A plaintiff could thus avoid the risks and costs associated with trial, obtain payment via settlement, then sue his or her attorney and seek the verdict value of the underlying case. As the petitioner in *Thomas* noted, "[s]uch a system would essentially entitle every plaintiff to settle his case and recover a sum certain and then, without risk, seek to recover that which may have been awarded had the underlying matter been tried."[138] The *Thomas* decision thus allows plaintiffs not only to have two bites at the apple; it allows plaintiffs to have the second bite without risk and at the expense of their former attorney. As Judge Chasanow stated, the *Thomas* decision means that "[a]ny plaintiff who has accepted an attorney's advice to settle a claim merely has to find another attorney to opine that the settlement was inadequate and should not have been recommended."[139] The client will be able to take these actions at the expense of his former attorney because he or she "can use the declaration filed by the attorney, the letters written to the insurance adjuster, the initial settlement demands and all the positive things the attorney told the client about the case as admissions to prove liability and damages."[140] The *Thomas* majority has therefore provided lawyers with a greater incentive not to settle suits.

While it is true that the *Thomas* decision seems to bring Maryland in line with the majority of other states that have considered legal malpractice in this context, adoption of legal principles ought not to be a popularity contest. Various commentators have criticized the trial within a trial method for reasons other than those suggested by Judges Chasanow and Cathell.[141] While the *Thomas* majority acknowledged

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137. *Thomas*, 351 Md. at 541, 718 A.2d at 1201 (Chasanow, J., concurring and dissenting).

138. Petitioner's Brief at 15, *Thomas* (No. 7).

139. *Thomas*, 351 Md. at 541, 718 A.2d at 1201 (Chasanow, J., concurring and dissenting).

140. *Id.*

141. *See, e.g., Developments in the Law, supra* note 83, at 1569 (criticizing the trial within a trial approach because "[a]s an initial matter, the complexity of the trial-within-a-trial may

the widespread criticism of the trial within a trial method, even stating the specific grounds that its detractors have offered as weaknesses, the *Thomas* court fails to address any of these criticisms, instead summarily concluding that "[t]he courts have not seemed eager to adopt any of the alternatives that have been suggested . . . so the trial within a trial approach continues to be used."[142] The majority's reasoning is not persuasive. Given the widespread dissatisfaction with the trial within a trial method,[143] the court ought to have considered the feasibility of other alternatives, such as loss of a chance.[144]

c. Suggestions for Practice.—Approximately twenty percent of civil settlements will eventually "be resurrected in the form of malpractice actions initiated by dissatisfied clients."[145] Courts typically view performing any sort of post mortem on the negotiation process as antithetical to the American judicial system, and therefore avoid scrutinizing the negotiation process.[146] Attorneys would do well to consider taking some preventative measure in order to minimize the

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discourage clients from suing their lawyers. Moreover, the trial-within-a-trial method may allow an attorney's negligence to shield him from malpractice liability"); Leubsdorf, *supra* note 83, at 145 (decrying the trial within a trial approach for the following reasons: "Aside from its expense, the doctrine gives a client the task of litigating a former case against the client's own former lawyer, who knows the strengths and weaknesses of the case, perhaps from the client's own confidences. Furthermore, the doctrine puts a lawyer in the unseemly position of contending that a case he or she agreed to bring was hopeless"); Epstein, *supra* note 53, at 463, 468-69 (positing that "numerous problems of proof arise in the post-settlement legal malpractice claim," and advocating that courts permits attorneys to assert client contributory/comparative negligence as a defense, by presenting evidence of the client's subjective reasons for settling the case); Lord, *supra* note 80, at 1482-83 (observing that courts are dissatisfied with the trial within a trial method).

142. *Thomas*, 351 Md. at 533, 718 A.2d at 1197.

143. *See supra* notes 83 & 141 and accompanying text.

144. *See generally* Lord, *supra* note 80, at 1486-99. Loss of change "has arisen where alleged mistreatment exacerbates a preexisting condition, and both contribute to some end result that does not appear readily divisible. Loss of chance operates as a device to compensate for the chance to avoid or decrease the harm that results." *Id.* at 1485. Causation and injury are isolated under loss of change, with the issue of whether negligence exists being separate from the nature and extent of the loss. *See id.* at 1498. Lord posited that

> [t]o establish an injury under the loss of change doctrine, the client must prove that, but for the attorney's negligence, the diminished opportunity to recover was lost. In order to prove cause, the client must show that the claim or defense was meritorious by a but for standard. The trial-within-a-trial method of proof would not be necessary. The pleadings should suffice to meet this causal burden, analogous to a motion to dismiss for failure to state a claim.

Id. at 1499.

145. Epstein, *supra* note 53, at 453.

146. *See id.* at 463-64 (stating that "[t]he American judicial system harbors a long-standing policy that encourages settlement by keeping the negotiation process confidential and promoting the effective and efficient settlement of cases").

chances of their being confronted with a malpractice suit concerning former settlement recommendations.[147]

When settling cases, an attorney may be able to avoid potential misunderstandings by writing a letter to his or her client(s) in which he or she summarizes the advantages and disadvantages of settlement for the client(s).[148] Such correspondence would indicate that the attorney's recommendation was based on a thorough and, even more important, a contemporaneous understanding of the case. Furthermore, clearly communicating with a client in this manner would obviate the malpractice plaintiff's trial argument that the lawyer-defendant's reasons for settling were offered only as a post-hoc excuse. By documenting such reasons in a letter to his or her client(s), the attorney would more thoroughly inform the client, who must ultimately decide whether or not settlement is acceptable. Moreover, such communication would not place a client at risk in the underlying litigation, as the attorney-client privilege would protect such communication.[149] The attorney, however, would be allowed to introduce such communication at the client's potential subsequent malpractice trial, as suing one's attorney for malpractice waives the privilege as it pertains to relevant communications.[150] Consultation with another attorney (or attorneys) concerning settlement ranges is another suggestion.

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147. *See* Prande v. Bell, 105 Md. App. 636, 656, 660 A.2d 1055, 1065 (1995). The Court of Special Appeals stated:

> Before recommending that a client settle, or not settle, a claim, either before or after the suit is filed, the lawyer must have, at a minimum, an adequate appreciation of: (1) the relevant facts, (2) the potential strengths and weaknesses of the client's case as it then stands and as it might possibly be developed, (3) the likely costs, both monetary and psychological, of proceeding further with litigation, and (4) what the outcome is likely to be if the case proceeds further, based not only on the relevant law but also on what triers of fact in the community are doing in similar kinds of cases.

Id.

148. *See* Epstein, *supra* note 53, at 472 ("[A]n attorney should be required to provide a client with a statement of the case before settlement. This statement would precisely articulate the ramifications of settlement and act as written confirmation of the attorney's work on the case.").

149. *See* RESTATEMENT OF THE LAW GOVERNING LAWYERS, §§ 118, 119, Attorney-Client Privilege Provisions (1998), *reprinted in* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS (2000) (indicating when the attorney-client privilege may properly be invoked, and defining a "communication" in the context of the attorney-client privilege).

150. *Id.* § 133 (pointing out that the attorney-client privilege does not apply when a lawyer needs to protect himself or herself in certain disputes with a client, or against a charge that the lawyer acted wrongfully).

5. Conclusion.—In holding attorneys to an ordinary, rather than a heightened, standard of care for malpractice in negligent recommending settlement, and in determining that damages should be measured by the "trial within a trial" approach, the Court of Appeals has enabled any client dissatisfied with the settlement secured by his or her attorney to sue that attorney for the full verdict amount without incurring any of the risks or costs that a plaintiff would ordinarily incur in proceeding to trial. The majority's decision contravenes public policy; its potential effects include attorneys' increased hesitancy in making settlements as well as encouraging plaintiffs to initiate cavalier claims against their attorneys. To borrow from the *Muhammad* dissent, the *Thomas* majority has, perhaps unwittingly, created a "client's holiday."[151]

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151. The *Muhammad* dissent sharply criticized that court's majority opinion for being too lenient on attorneys, opining that "[t]he majority has just declared a 'lawyer's holiday.' It's Christmastime for Pennsylvania lawyers." Muhammad v. Strassburger, McKenna, Messer, Shilobod, and Gutnik, 587 A.2d 1346, 1352 (Pa. 1991) (Lassen, J., dissenting).

II. CIVIL PROCEDURE

A. *The Common Law Writ of Error Coram Nobis Remains Available as a Civil Procedure to Challenge Collaterally a Criminal Judgment*

In *Ruby v. State*,[1] the Court of Appeals contemplated whether a petition for the writ of error coram nobis is a civil or criminal proceeding.[2] The Court of Appeals held that a proceeding on a writ of error coram nobis is a civil matter, independent of the underlying judgment being contested.[3] The court concluded that the lower court erred by addressing the propriety of the grant of the civil writ in the underlying criminal case, rather than in a separate proceeding.[4] The court reached its unanimous holding after reviewing Maryland, federal, and out-of-state case law as well as the specific factual and procedural circumstances of the case.[5]

For over 200 years, Maryland has recognized the availability of the common law writ of error coram nobis to defendants in both civil and criminal cases.[6] Although a majority of jurisdictions have either partially or totally abrogated the writ,[7] the *Ruby* decision is reflective of Maryland's steadfast commitment to the continued viability of common law remedies with their common law attributes.[8] Most importantly, the *Ruby* decision demonstrates Maryland's recognition of the common law rule that a petition for the writ of error coram nobis is a civil proceeding,[9] and therefore, the Maryland Rules of Civil Procedure apply.[10] While the federal courts have broadened the writ beyond its traditional common law purpose,[11] the court's adherence to

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1. 353 Md. 100, 724 A.2d 673 (1999).

2. *Id.* at 104. The writ of error coram nobis is a common law tool primarily used to correct factual errors not appearing on the record that would have precluded the court's judgment had the court known of the error when it rendered judgment. *See id.* at 104-05, 724 A.2d at 675-76.

3. *Id.* at 111, 724 A.2d at 678-79.

4. *Id.* at 112-13, 724 A.2d at 679.

5. *Id.* at 104-13, 724 A.2d at 675-79.

6. *See id.* at 105, 724 A.2d at 676 (noting that the writ has been available in Maryland since Maryland adopted English common law as it stood on July 4, 1776).

7. *See, e.g.*, Keane v. State, 164 Md. 685, 689, 166 A. 410, 411 (1933) (noting that "the efficacy and usefulness" of the writ "[has] in some states been destroyed by statute," and in all states has "to some extent [been] modified by statute or practice").

8. *See Ruby*, 353 Md. at 111, 724 A.2d at 678 ("The original common law remedies with their common law attributes continue to be viable.").

9. *See id.*, 724 A.2d at 678-79.

10. *See id.* at 113, 724 A.2d at 679 (applying Rule 8-202(a) of the Maryland Rules of Civil Procedure).

11. *See, e.g.*, United States v. Wickham, 474 F. Supp. 113, 116 (C.D. Cal. 1979) (recognizing that although the writ of error coram nobis was limited to the correction of errors of fact at common law, the federal courts permit the writ to correct constitutional or other

common law principles in *Ruby* foreshadows the dim prospects in Maryland for future expansions of the writ beyond its traditional common law confines.

1. The Case.—On November 25, 1993, the petitioner, Carl Walter Ruby, was involved in an automobile accident in Cumberland, Maryland.[12] According to the other driver, Mary O'Neal, a car occupied by Ruby and his mother struck her car.[13] O'Neal testified that Ruby was the driver and that his mother urged her not to call the police.[14] Nevertheless, the police were called, and when they responded, they learned that Ruby's driver's license was suspended.[15] At the scene, Ruby told the police that his mother had been driving,[16] and at trial, both Ruby and his mother testified that she was driving the car when the accident occurred.[17]

Ruby was convicted by a jury in the Circuit Court for Allegany County of driving with a suspended out-of-state license, knowingly giving false accident report information, and failing to yield the right of way.[18] The court sentenced Ruby to consecutive terms of sixty days and one year in the Allegany County Detention Center, plus a fine of fifty dollars and two years of unsupervised probation following his release from custody.[19] Ruby's conviction was affirmed by the Court of Special Appeals on April 25, 1995, in an unreported per curiam opinion.[20]

On June 22, 1995, Ruby filed a motion for a new trial on the basis of newly discovered evidence.[21] Following a hearing on September 20, 1995, at which Ruby appeared without counsel, the motion was denied by order, filed September 26, 1995.[22] Ruby again appealed to the Court of Special Appeals, which reversed the decision of the cir-

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fundamental errors as well as traditional errors of fact); *see also infra* notes 71-72 and accompanying text (discussing the expansion of the common law purpose of the writ in the federal courts).

12. *See Ruby*, 353 Md. at 102, 724 A.2d at 674.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.* at 102-03, 724 A.2d at 674.

17. *See id.* at 103, 724 A.2d at 674.

18. *See id.*

19. *See id.*

20. *See id.*

21. *See id.* The newly discovered evidence was an insurance report which stated that Ruby's mother was the driver of the car when the accident occurred. *See id.* at 103 n.1, 724 A.2d at 674 n.1.

22. *See id.* at 103, 724 A.2d at 674-75.

cuit court and remanded the matter for a new hearing due to the inadequacy of the court's inquiry into Ruby's waiver of counsel.[23]

Pursuant to the remand by the Court of Special Appeals, the circuit court heard Ruby's motion for new a trial on December 5, 1996, and denied the motion by memorandum opinion and order dated December 6, 1996.[24] Notice of this order was not sent to either Ruby or the State's Attorney.[25] Ruby became aware of the court's action after the thirty-day period for filing a timely appeal had expired.[26]

On March 18, 1997, Ruby filed a motion for a belated appeal, which was denied by the circuit court on March 25, 1997.[27] On April 1, 1997, Ruby pursued a motion for reconsideration of the order denying his motion for a belated appeal and a motion for reconsideration of the denial of his motion for a new trial, both of which were denied.[28]

On May 2, 1997, Ruby filed a petition for writ of error coram nobis in the circuit court, "requesting as relief a belated appeal of the December 6, 1996, denial of his motion for a new trial."[29] On May 30, 1997, the circuit court, sitting as a civil court, issued the writ, granting Ruby a belated appeal of the denial of his motion for a new trial in his original criminal case.[30] The State failed to appeal from the circuit court's grant of the writ of error coram nobis.[31]

On June 4, 1997, Ruby pursued his belated appeal in the criminal case, "pursuant to the leave granted by the writ."[32] Upon a motion by the State, the Court of Special Appeals dismissed Ruby's appeal, reasoning that it did not have jurisdiction to hear the appeal because the circuit court had improperly issued the writ of error coram nobis.[33] The Court of Appeals granted certiorari to review the intermediate appellate court's dismissal of Ruby's belated appeal in the criminal case.[34]

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23. *See id.*, 724 A.2d at 675.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.* at 103-04, 724 A.2d at 675.

28. *See id.*

29. *Id.* Ruby's petition for writ of error coram nobis was assigned a civil case number, and was dealt with as a civil matter. *See id.*

30. *See id.*

31. *See id.*

32. *Id.*

33. *See id.*

34. *See id.*

2. Legal Background.—The writ of error coram nobis is "a common law tool primarily used to correct factual errors" not appearing on the record that would have precluded the court's judgment had the court known of the error when it rendered judgment.[35] In the United States, the writ's efficacy and usefulness have to some extent been modified by statute or by practice.[36] In fact, several jurisdictions have statutorily destroyed the common law writ of error coram nobis.[37] In those jurisdictions where the writ of error coram nobis is still available, most agree that a proceeding on the writ is a civil matter procedurally independent of the underlying judgment being contested.[38] Some courts, however, have held that although a coram nobis proceeding is civil in nature, it is properly part of the original criminal case, and not of an independent civil action.[39] The federal circuits are divided as to whether a petition for coram nobis is gener-

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35. *See id.* at 104-05, 724 A.2d at 675-76.

36. *See* Keane v. State, 164 Md. 685, 689, 166 A. 410, 411 (1933) (stating that some states have eliminated the writ by statute, while other states have modified the writ); *see also* Hackett v. People, 406 P.2d 331, 332 (Colo. 1965) (observing that the purpose of ancient writ of error coram nobis is now attained by the filing of a motion to set aside the judgment); Crews v. State, 333 S.E.2d 176, 177 (Ga. Ct. App. 1985) (finding that the writ of error coram nobis has fallen into disuse due to the modern practice of applying to the court by motion for the relief sought); Kemp v. State, 506 S.E.2d 38, 39 n.4 (W. Va. 1997) (per curiam) (recognizing that although the West Virginia Rules of Civil Procedure abolished the writ of coram nobis in civil cases, the writ remains available in criminal cases).

37. Land v. State, 1999 WL 588215, *12 n.4 (Ala. Aug. 6, 1999) (Maddox, J., concurring) (recognizing that "the common law writ of coram nobis in criminal cases has been incorporated into Rule 32 [of the Alabama Rules of Criminal Procedure]" (citing 2 HUGH MADDOX, ALABAMA RULES OF CRIMINAL PROCEDURE § 32.0, at 971 (2d ed. 1994))); *In re* Duffy, 709 A.2d 707, No. 169, 1998, 1998 WL 231159, at *1 (Del. Apr. 29, 1998) (unpublished disposition) (observing that Delaware has abolished the writ of error coram nobis); Wood v. State, 34 Fla. L. Weekly S240 (Fla. May 27, 1999) (recognizing that the writ of error coram nobis has been eliminated by statute for both custodial and noncustodial movants); People v. Sturgeon, 649 N.E.2d 1385 (Ill. 1995) (noting that the Illinois legislature has explicitly abolished the writ of error coram nobis, but has incorporated the relief available under the writ into the Illinois Code (citing 735 ILL. COMP. STAT. 5/2-401(a) (West 1992))); Commonwealth v. Spalding, 991 S.W.2d. 651, 655 (Ken. 1999) (announcing that the writ of error coram nobis has been abolished by statute in both criminal and civil proceedings).

38. *See, e.g.*, State v. Spencer, 41 N.E.2d 601, 603 (Ind. 1941) (observing that the petition for the writ of error coram nobis is considered civil in nature); State v. Smith, 324 S.W.2d 707, 711-12 (Mo. 1959) (recognizing that a writ of error coram nobis is civil in nature rather than criminal in nature); Dobie v. Commonwealth, 96 S.E.2d 747, 752 (Va. 1957) (noting that a writ of error coram nobis "is in the nature of a civil action").

39. *See* Dwyer v. State, 120 A.2d 276, 283 (Me. 1956) (holding that a proceeding on a writ of error coram nobis is part of the underlying criminal matter); State v. Endsley, 331 P.2d 338, 340 (Or. 1958) (recognizing that a writ of error coram nobis "is not . . . a new case, civil in nature, but simply a part of the original criminal proceeding").

ally a civil or a criminal proceeding.[40] Nevertheless, in Maryland, it is clear that the writ of error coram nobis remains viable as a civil matter independent of the underlying action from which it arose.[41]

a. Common Law Origins of the Writ of Error Coram Nobis.—The English common law writ of error coram nobis evolved in England during the sixteenth century.[42] Applied in both criminal and civil cases,[43] the writ was one of two common law writs available to correct errors of fact that could not have been ascertained through ordinary diligence at the time of the trial and that, in all probability, would have affected its outcome.[44] Coram nobis, along with the writ of error *coram vobis*, directed a particular court of law to examine its own judgment.[45] The term "coram nobis," which means "before us," is a writ

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40. *Compare* United States v. Craig, 907 F.2d 653, 656-57 (7th Cir. 1990) (finding that the time limits for civil, rather than criminal, appeals apply to a petition for a writ of error coram nobis), United States v. Cooper, 876 F.2d 1192, 1194 (5th Cir. 1989) (per curiam) (noting that a coram nobis motion is a civil proceeding), *abrogated on other grounds by* Smith v. Barry, 502 U.S. 244 (1992), United States v. Balistrieri, 606 F.2d 216, 220-21 (7th Cir. 1979) (recognizing that a coram nobis motion is civil in nature), Neely v. United States, 546 F.2d 1059, 1965-66 (2d Cir. 1976) (finding that a petition for the writ of error coram nobis is not a proceeding in the original criminal prosecution but an independent civil suit), United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (applying the civil rules of procedure to a petition for the writ of error coram nobis), *and* United States v. Tyler, 413 F. Supp. 1403, 1404-05 (M.D. Fla. 1976) (noting that coram nobis proceedings are civil in nature), *with* Telink, Inc. v. United States, 24 F.3d 42, 46 (9th Cir. 1994) (concluding that "a petition for the writ of error coram nobis is a step in the original criminal proceedings, not the beginning of a separate civil action" (citing Yasui v. United States, 772 F.2d 1496, 1499 (9th Cir. 1985)), United States v. Mills, 430 F.2d 526, 528 (8th Cir. 1970) (recognizing that a petition for the writ of error coram nobis is a part of the original criminal proceeding (citing United States v. Morgan, 346 U.S. 502, 505 n.4 (1954))), Booker v. Arkansas, 380 F.2d 240, 243 (8th Cir. 1967) (observing that procedurally coram nobis is a step in the original criminal proceeding itself), *rev'd on other grounds sub nom.* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), *and* United States v. Hanks, 340 F. Supp. 625, 626 (D. Kan. 1972) (stating that "[c]oram nobis is not an independent civil action," but a step in the criminal case).

41. *See Ruby*, 353 Md. at 111, 734 A.2d at 678-79.

42. *See* LARRY W. YACKLE, POSTCONVICTION REMEDIES § 9, at 36-37 (1981).

43. *See* Madison v. State, 205 Md. 425, 432, 109 A.2d 96, 99 (1954) (stating that the writ of error coram nobis "has been used in both civil and criminal cases").

44. *See id.* (recognizing that "[t]he purpose of the writ is to bring before the court facts which were not brought into issue at the trial of the case, and which were material to the validity and regularity of the proceedings, and which, if known by the court, would have prevented the judgment"); Keane v. State, 164 Md. 685, 689, 116 A. 410, 411 (1933) (recognizing that the purpose of the writ of error coram nobis was "to determine whether facts existed which were not known to the court at the trial and not in issue under the pleadings, but which, if known, would have prevented the judgment which actually was entered from being entered").

45. *See Keane*, 164 Md. at 691, 166 A. at 412 (stating that "error *coram vobis*, but more correctly *coram nobis*, . . . is addressed to the court which rendered judgment" (internal quotation marks omitted) (internal citation omitted)); Bernard v. State, 193 Md. 1, 3, 65

that lay in the King's Bench, and the term "coram vobis," which means "before you," is a writ that lay in the Court of Common Pleas.[46] In the United States, the common law distinction between "coram nobis" and "coram vobis" lost its significance, and "coram nobis" has survived as the predominant term.[47]

b. The Nature of the Writ of Error Coram Nobis in Federal Court.—Before 1954, the availability of any post-conviction remedy in the nature of a writ of error coram nobis to challenge criminal convictions in federal district courts was unsettled.[48] Although the Supreme Court had intimated that such a remedy did not exist,[49] the circuit courts were divided.[50] During the 1940s, a number of developments in federal law made unclear the availability of any post-conviction remedy in the nature of a writ of error coram nobis to those convicted of federal crimes. In 1944, the Supreme Court promulgated Rule 35 of the Federal Rules of Criminal Procedure, allowing a district court to correct "an illegal sentence at any time."[51] Furthermore, a 1946 amendment to Federal Rule of Civil Procedure 60(b) abolished the

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A.2d 297, 298 (1949) (stating that "the purpose of the writ of *error coram nobis* . . . is to bring before the court a judgment previously rendered by it").

46. *See* YACKLE, *supra* note 42, § 9, at 37.

47. *See, e.g.*, United States v. Mayer, 235 U.S. 55, 67-69 (1914) (recognizing the writ of coram nobis as the modern substitute of coram vobis).

48. *See* DONALD E. WILKES, JR., FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF § 3-3, at 27 (2d ed. 1987) (noting that "[u]ntil 1954, the Supreme Court never decided whether . . . there existed a federal coram nobis remedy extending to persons convicted in federal court"); YACKLE, *supra* note 42, § 37, at 168-69 (recognizing that lower court decisions were "divided on the availability of the common law remedy [of coram nobis] in criminal cases" until the Supreme Court decided *Morgan* in 1954).

49. *See* United States v. Smith, 331 U.S. 469, 475-76 n.4 (1947) (finding it "difficult to conceive of a situation in a federal criminal case today where [coram nobis] would be necessary or appropriate").

50. *Compare* Allen v. United States, 12 F.2d 193, 194 (6th Cir. 1947) (per curiam) (deciding that coram nobis was a proper remedy where petitioner claimed relief on a basis of insanity at the time of his plea, because if that fact had been known at the time of judgment it might have led to a different result), Roberts v. United States, 158 F.2d 150, 150-51 (4th Cir. 1946) (per curiam) (granting coram nobis relief to determine whether petitioner had intelligently entered plea of guilty and competently waived counsel where the record did not show whether the petitioner had been informed of his right to counsel and there was evidence of his mental disability), Garrison v. United States, 154 F.2d 106, 107 (5th Cir. 1946) (per curiam) (granting coram nobis relief for violation of petitioner's due process rights where petitioner claimed that United States officers had forced material witnesses to commit perjury), *and* United States v. Monjar, 64 F. Supp. 746, 747 (D. Del. 1946) (ruling that coram nobis still existed as a valid remedy despite the government's insistence to the contrary), *with* United States v. Kerschman, 201 F.2d 682, 684 (7th Cir. 1953) (concluding that writs of error coram nobis had been abolished by Rule 60(b)).

51. FED. R. CRIM. P. 35.

writ of coram nobis in civil cases.[52] In 1948, Congress enacted 28 U.S.C. § 2255,[53] authorizing motions to attack sentences "in the nature of the ancient writ of error coram nobis."[54]

In 1954, in the landmark case of *United States v. Morgan*,[55] the Supreme Court finally resolved the issue of whether coram nobis continued to exist as a criminal post-conviction remedy.[56] The *Morgan* Court held that the common-law writ of error coram nobis was available as an independent post-conviction remedy in federal district courts.[57] The Court rejected the government's arguments that Rule 60(b) abolished coram nobis in criminal as well as civil cases,[58] that Rule 35 rendered it unnecessary,[59] or that § 2255 replaced coram nobis with an exclusive statutory remedy.[60] Instead, the Court held that the federal district court's power to grant the writ of error coram nobis was authorized by the all-writs section of the Judicial Code.[61]

Although *Morgan* revitalized the writ in the federal courts,[62] the decision also caused confusion in the federal circuits regarding the

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52. FED. R. CIV. P. 60(b). Rule 60(b) provides that "[w]rits of coram nobis, . . . are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." *Id.*

53. *See* Act of June 25, 1948, ch. 646, 62 Stat. 967 (codified as amended at 28 U.S.C. § 2255 (1994)).

54. H.R. REP. NO. 80-808, at A180 (1947), *reprinted in* 1948 U.S.C.C.A.N. 1692, 1908.

55. 346 U.S. 502 (1954).

56. *Id.* Morgan filed a petition for the writ of error coram nobis in the District Court for the Northern District of New York to challenge a federal conviction. *See id.* at 504. The district court treated the petition as a § 2255 motion and denied relief on the ground that Morgan was no longer in custody and § 2255 has a custody requirement. *See id.*

57. *Id.* at 511. The *Morgan* Court concluded that a motion in the nature of coram nobis was available in the district court.

58. *Id.* at 505 n.4. The *Morgan* Court held that a motion in the nature of coram nobis challenging a criminal conviction was a "step in the criminal case" and was, therefore, unaffected by Rule 60(b). *Id.* (citing Kurtz v. Moffitt, 115 U.S. 487, 494 (1885)).

59. *See id.* at 505-06. The Court argued that coram nobis was still necessary because Rule 35 applied only to illegal sentences, which are sentences "the judgment of conviction did not authorize." *Id.* at 506.

60. *See id.* at 510-11. The government argued that § 2255 codified the remedy in the nature of the writ of error coram nobis and restricted it to cases in which the petitioner was still in custody. *See id.* at 510. The *Morgan* Court held that § 2255 had been enacted to meet the difficulties associated with the administration of federal habeas corpus, and thus, § 2255 did not occupy the entire field of remedies in the nature of coram nobis. *See id.* at 511.

61. *Id.* at 506-07, 512-13 (construing 28 U.S.C. § 1651(a) (1952)).

62. Commenting on the Supreme Court's decision, the Seventh Circuit stated: "the ancient writ of error coram nobis rose phoenix-like from the ashes of American jurisprudence through the benign intervention of the supreme court in United States v. Morgan." United States v. Balistrieri, 606 F.2d 216, 219 (7th Cir. 1979) (citation omitted), *cert. denied*, 446 U.S. 917 (1980).

nature of the proceeding on a writ of error coram nobis.[63] At common law, a petition for writ of coram nobis was an independent civil proceeding governed by civil rules,[64] but footnote four in the Supreme Court's opinion in *Morgan*[65] has rendered uncertain its modern status as a civil or criminal proceeding in the federal courts.[66] According to some courts, the Supreme Court's statement that Rule 60(b) did not abolish coram nobis in criminal cases because it is "a step in the criminal case and not . . . the beginning of a separate civil proceeding"[67] meant that a petition for the writ of error coram nobis was a criminal proceeding governed by criminal rules.[68] According to other courts, however, the Supreme Court's subsequent statement in the footnote that a coram nobis proceeding "is of the same general character as [a motion] under 28 U.S.C. § 2255"[69] indicated that the petition for the writ of coram nobis was civil in nature, because at the time, courts viewed § 2255 motions as civil proceedings governed by civil rules.[70]

In federal district courts today, the scope of the writ of error coram nobis as a post-conviction remedy is much broader than its traditional common law scope.[71] Coram nobis may now be used to

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63. *See supra* note 40 and accompanying text (discussing the split among the federal circuits on the nature of the proceeding on the petition for the writ of error coram nobis).

64. *See* YACKLE, *supra* note 42, § 36, at 164.

65. *Morgan*, 346 U.S. at 505 n.4. Footnote four reads:

> Such a motion is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding. While at common law the writ of error coram nobis was issued out of chancery like other writs, the procedure by motion in the case is now the accepted American practice. As it is such a step, we do not think that Rule 60(b), Fed. Rules Civ. Proc., expressly abolishing the writ of error coram nobis in civil cases, applies. This motion is of the same general character as one under 28 U.S.C. § 2255.

Id. (internal citations omitted).

66. *See* YACKLE, *supra* note 42, § 36, at 165.

67. *Morgan*, 346 U.S. at 506 n.4.

68. *See, e.g.*, Yasui v. United States, 772 F.2d 1496, 1499 (9th Cir. 1985) (interpreting the language in footnote four of *Morgan* as "suggesting that criminal time limits [for appeal] should apply" to writs of error coram nobis); United States v. Mills, 430 F.2d 526, 528 (8th Cir. 1970) (citing to footnote four in *Morgan* for the proposition that coram nobis "is deemed a step in a criminal case").

69. *Morgan*, 346 U.S. at 506 n.4.

70. *See, e.g.*, United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (relying on the language in *Morgan* "characterizing a motion coram nobis as of the same general character as one under" § 2255 to support civil time limits for coram nobis motions).

71. *See* United States v. Wickman, 474 F. Supp. 113, 116 (1979) (finding that "[t]he Court concludes that the present-day scope of *coram nobis* is broad enough to encompass not only errors of fact that affect the validity or regularity of legal proceedings, but in addition, legal errors of a constitutional or fundamental proportion"); CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 592, at 429 (2d ed. 1982 & Supp. 1989) (stat-

correct constitutional or other fundamental errors as well as traditional errors of fact.[72] Despite the *Morgan* Court's assertion that courts should allow the review of judgments through "this extraordinary remedy only under circumstances compelling such action to achieve justice" and to correct errors "of the most fundamental character,"[73] several circuit courts have held that the scope of coram nobis as a post-conviction remedy is as broad as the scope of § 2255.[74] Coram nobis, however, is available only when § 2255 motions and other forms of relief, such as common law habeas corpus, are not.[75] This situation typically occurs when the petitioner is not in custody, because unlike § 2255 and habeas corpus, the writ of error coram

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ing that "[t]he present-day scope of *coram nobis* is broad enough to encompass not only errors of fact that affect the validity or regularity of legal proceedings, but also, legal errors of a constitutional or fundamental proportion").

72. *See* Farnsworth v. United States, 232 F.2d 59, 62-63 (D.C. Cir. 1956) (permitting a petition for writ of error coram nobis to set aside a judgment of conviction, because the petitioner had been deprived of his constitutional right to counsel); Garrison v. United States, 154 F.2d 106, 107 (5th Cir. 1946) (per curiam) (permitting a motion of coram nobis to set aside a sentence on the ground that two of the material witnesses against the movants were forced by threats to commit willful perjury in testifying as they did); Roberts v. United States, 158 F.2d 150, 151 (4th Cir. 1946) (per curiam) (permitting a writ of error coram nobis to review the defendant's mental competency, in connection with whether he could or did competently waive counsel); United States v. Steese, 144 F.2d 439, 442 (3d Cir. 1944) (allowing a writ of error coram nobis where the record failed to reveal the defendant's waiver of his right to counsel or that the defendant was expressly advised of such a right because it appeared that an injustice had been committed to the extent of depriving the defendant of his constitutional rights); *see also* Martha A. Mills & Sue A. Herrmann, *Collateral Attacks on Convictions: A Survey of Federal Remedies*, 12 J. MARSHALL J. PRAC. & PROC. 27, 62-63 (1978) (listing a variety of circumstances in which coram nobis has been made available).

73. United States v. Morgan, 346 U.S. 502, 511, 512 (1954) (internal quotation marks omitted) (quoting United States v. Mayer, 235 U.S. 55, 69 (1914)).

74. *See* United States v. Travers, 514 F.2d 1171, 1173 n.1 (2d Cir. 1974) (noting that the standards applied to a federal coram nobis claim are similar to those applied to a § 2255 motion); Laughlin v. United States, 474 F.2d 444, 452 (D.C. Cir. 1972) (sanctioning the district court's consideration of a writ of error coram nobis, although the issues raised were those covered under § 2255). *But see* United States v. Darnell, 716 F.2d 479, 481 n.5 (7th Cir. 1983) (concluding, based on *Morgan*, that the scope of coram nobis is more limited than the scope of § 2255).

Based on the first paragraph of § 2255, the Supreme Court has stated the grounds for relief under the statute as the following: "(1) 'that the sentence was imposed in violation of the Constitution or laws of the United States;' (2) 'that the court was without jurisdiction to impose such sentence;' (3) 'that the sentence was in excess of the maximum authorized by law;' and (4) that the sentence 'is otherwise subject to collateral attack.'" Hill v. United States, 368 U.S. 424, 426-27 (1962) (quoting 28 U.S.C. § 2255 (1988)).

75. *See, e.g.*, United States v. Brown, 413 F.2d 878, 879 (9th Cir. 1969) (refusing to allow writ of coram nobis where the appellant was still in federal custody); Adam v. United States, 274 F.2d 880, 882 (10th Cir. 1960) (same); *see also* YACKLE, *supra* note 42, § 36, at 165 (noting that a writ of coram nobis "is available only where the motion remedy under § 2255 is not").

nobis does not have a custody requirement.[76] The writ of error coram nobis is an essential element of the federal array of post-conviction remedies because the consequences of a federal conviction can be exceptionally harsh.[77]

c. Maryland's Approach to the Writ of Error Coram Nobis.—In Maryland, the writ of error coram nobis has been available to defendants in both civil and criminal cases for over 200 years.[78]

The Maryland Court of Appeals appears to have considered the scope and purpose of the writ of error coram nobis for the first time in *Hawkins v. Bowie.*[79] In this case, Hawkins obtained a civil judgment against Bowie.[80] Bowie then petitioned the court for a writ of error coram nobis, and the court granted the writ to correct the record of judgment, and reversed the judgment it had rendered.[81] The *Hawkins* court recognized:

> A writ of *coram nobis*, lies to correct an error in fact, in the same court where the record is; as if there be error in the process, or through default of the clerk, it shall be reversed in the same court, by writ of error sued thereon before the same justices. But of an error in law, which is the default of the justices, the same court cannot reverse the judgment by writ of error, nor without a writ of error, but this error ought to be redressed in another court, before other justices, by writ of error.[82]

Several years later, the Court of Appeals denied petitions for a writ of error coram nobis in *Hawks v. State*[83] and *Keane v. State.*[84] In

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76. *See* YACKLE, *supra* note 42, § 36, at 165; *see also* Byrnes v. United States, 408 F.2d 599, 602 (9th Cir.) (noting that writs of error coram nobis are "used to attack convictions involving collateral legal disadvantages which survive the satisfaction of a sentence"); Azzone v. United States, 341 F.2d 417, 418 (8th Cir. 1965) (recognizing that "by a proceeding in the nature of coram nobis, the convicted party may proceed in a federal district court to have set aside his conviction and sentence . . . though he had served full time for which he had been sentenced").

77. *See* Note, *The Need for Coram Nobis in the Federal Courts*, 59 YALE L.J. 786, 786-87 (1950) (recognizing that former convicts "may be ineligible for naturalization, military service, and certain civil rights such as voting or holding offices" (footnotes omitted)).

78. *See Ruby*, 353 Md. at 105, 724 A.2d at 676 (recognizing that "[b]ecause Maryland adopted the Common Law of England as it existed on July 4, 1776 subject to constitutional conflict, legislative amendment, or modification by this Court, . . . the common law writ of error coram nobis is a procedure still available in this State" (internal citation omitted)).

79. G. & J. 428 (1983).

80. *See id.* at 428.

81. *See id.* at 437.

82. *Id.* (internal citations omitted).

83. 162 Md. 30, 32, 157 A. 900, 901 (1932).

84. 164 Md. 685, 695, 166 A. 410, 414 (1933).

Hawks, the appellant alleged, in his petition, that his sentence to industrial school, and subsequent sentence to confinement in the house of correction warranted the issuance of a writ of error coram nobis.[85] The Court of Appeals affirmed the lower court's dismissal of the petition,[86] reasoning that "the petition of the appellant allege[d] no facts of any kind unknown to the court at the time the appellant was sentenced to confinement . . . , which would have prevented or prohibited the rendition of that judgment."[87]

In *Keane*, the Court of Appeals considered whether a petition for a writ of error coram nobis, alleging that the prosecuting witness mistakenly identified the petitioner and that the prosecution failed to present to the jury the fact that other eyewitnesses of the crime failed to identify the petitioner, was properly dismissed.[88] The court held that the dismissal of the petition was proper,[89] reasoning that the purpose of the writ of error coram nobis is "not to permit a review of the evidence given in connection with the issues actually tried, but to determine whether witnesses who actually testified before a jury sworn on those issues testified falsely."[90] According to the court, the purpose of the writ, in its original as well as in modern practice is "to determine whether facts existed which were not known to the court at the trial and not in issue under the pleadings, but which, if known, would have prevented the judgment which actually was entered from being entered."[91] The court recognized that although "[i]t is unfortunate that there is no complete and adequate remedy for such a wrong as that of which the petitioner complains"[92] the writ of error coram nobis "is not broad enough to reach every case in which there has been an erroneous or unjust judgment on the sole ground that no other remedy exists."[93]

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85. *Hawks*, 162 Md. at 31, 157 A. at 901.

86. *Id.* at 32, 157 A. at 901.

87. *Id.*

88. *Keane*, 164 Md. at 686-87, 166 A. at 410-11.

89. *Id.* at 694-95, 166 A. at 414.

90. *Id.* at 689, 166 A. at 411. The court also held that the State's mere failure to call two witnesses, present when the robbery was committed, did not warrant the issuance of a writ of error coram nobis. *Id.* at 693, 166 A. at 413.

91. *Id.* at 689, 166 A. at 411. The *Keane* court also explained that if the purpose of the writ "was to permit the court in which the judgment was entered to decide whether the witnesses in the case had testified falsely, and, if it decided that they had, to reverse it, instead of being the end of the litigation, the judgment might well be but the beginning of it." *Id.*, 166 A. at 411-12.

92. *Id.* at 694, 166 A. at 413.

93. *Id.* at 692, 166 A. at 412-13.

Years later, the Court of Appeals again discussed the unavailability of the writ of error coram nobis for allegations of false testimony in *Bernard v. State*[94] and *Tyson v. Warden, Maryland Penitentiary*.[95] Following *Keane*, the *Bernard* court recognized that "[t]he writ will not lie to correct an issue of fact which has been adjudicated even though wrongly determined; nor for alleged false testimony at the trial; nor for newly discovered evidence."[96] The *Bernard* court also observed that the "writ will not lie where the accused has another adequate remedy at law, as by motion for a new trial, an appeal to a higher court, or other existing statutory proceeding."[97]

In *Tyson v. Warden of Maryland Penitentiary*,[98] the court denied the petition for the writ of error coram nobis for the same reasons that it denied the petitions for the writ of error coram nobis in *Keane* and *Bernard*.[99] The petition in *Tyson* alleged that a mistake in identity was made, and that the applicant was wrongfully convicted of a crime.[100] The *Tyson* court observed that the "appropriate remedy in such a case is an application to the executive department."[101]

After *Bernard* and *Tyson*, Maryland began to treat a motion to strike out the verdict, judgment and sentence entered, based on a witness repudiating an affidavit, as if the remedy of the writ of error coram nobis had been invoked. In *Madison v State*,[102] the appellant filed a motion to strike out his judgment and sentence on the grounds of newly discovered evidence, alleging that a principal witness had testified falsely and had recanted her testimony.[103] Although Madison did not in terms seek a writ of error coram nobis, the court dealt with the application as if it were for the writ and reviewed the instances in which the writ was and was not available.[104] The court ultimately con-

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94. 193 Md. 1, 65 A.2d 297 (1949).

95. 198 Md. 652, 80 A.2d 613 (1951).

96. *Bernard*, 193 Md. at 4, 65 A.2d at 298.

97. *Id.* (citing Hawks v. State, 162 Md. 30, 157 A. 900 (1932); Keane v. State, 164 Md. 685, 166 A. 410 (1933)).

98. 198 Md. 652, 653, 80 A.2d 613, 613 (1951).

99. *Id.* at 653, 80 A.2d at 613-14.

100. *Id.* at 653, 80 A.2d at 613.

101. *Id.*, 80 A.2d at 614 (citing Keane v. State, 164 Md. 685, 166 A. 410 (1933)).

102. 205 Md. 425, 109 A.2d 96 (1954).

103. *Id.* at 430, 109 A.2d at 98.

104. *Id.* at 432, 109 A.2d at 99. Following *Keane* and *Bernard*, the court recognized that:

> *coram nobis* will not lie (1) to correct an issue of fact which has been adjudicated, even though wrongly determined, or (2) to determine whether any witnesses testified falsely at the trial, or (3) to present newly discovered evidence, or (4) to strike out a conviction on the ground that the prosecuting witness was mistaken in his identification of the accused as the person who committed the crime.

Id.

cluded that relief could not be granted on the claim that a witness had testified falsely at the trial.[105] Following *Bernard* and *Keane*, the *Madison* court observed that

> if the writ were available to allow the court in which the judgment was entered to decide subsequently whether the witnesses who testified at the trial had testified falsely, and, if it should decide that they had, to strike out the judgment, then the judgment might be the beginning rather than the end, of litigation.[106]

The Maryland Court of Appeals's decision in *Madison* occurred several months after the Supreme Court's decision in *Morgan*,[107] where the court expanded the scope of the writ to cover all "errors of the most fundamental character."[108] Although several federal circuits followed the Court by expanding the writ beyond its traditional common law confines,[109] Maryland chose not to follow this course, and in *Skok v. State*[110] the Court of Special Appeals explained the rationale for this position.[111]

In *Skok*, the appellant filed two petitions for a writ of error coram nobis based on facts not known to the trial judges when his pleas were accepted.[112] After thoroughly reviewing the relevant authorities,[113]

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105. *Id.* at 435, 109 A.2d at 100-01.

106. *Id.* at 432, 109 A.2d 99 (citing Keane v. State, 164 Md. 685, 698, 166 A. 410 (1933); Bernard v. State, 193 Md. 1, 65 A.2d 297 (1949)). The Court of Appeals continued to treat a motion to strike out or modify a sentence after conviction, based on false testimony, as if the remedy of the writ of error coram nobis had been invoked. *See* Johnson v. State, 215 Md. 333, 336, 138 A.2d 372, 373 (1958) (recognizing that the motion in the present case "purports to be a motion to strike out or modify the sentence," but analyzing the motion as if it were "a motion in the nature of a writ of *coram nobis*"); Carr v. State, 218 Md. 318, 321, 146 A.2d 182, 193 (1958) (recognizing that if the motion to strike out the verdict, judgment, and sentence "in this case were treated as what it does not purport to be, a petition for a writ of error *coram nobis*, the alleged perjury of the prosecuting witness would not sustain it" (citation omitted)).

107. *Morgan* was decided on January 4, 1954, United States v. Morgan, 346 U.S. 502, 502 (1954), and *Madison* was decided on November 12, 1954, Madison v. State, 205 Md. 425, 425, 109 A.2d 96, 96 (1954).

108. *See Morgan*, 346 U.S. at 512 (concluding that the allegation of an involuntary waiver of counsel was sufficient to sustain a writ of error coram nobis).

109. *See supra* notes 71-72 and accompanying text (discussing the modern scope of the writ in federal courts).

110. 124 Md. App. 226, 721 A.2d 259 (1998).

111. *Id.* at 236-42, 721 A.2d at 264-68.

112. *See Skok*, 124 Md. App. at 236-42, 721 A.2d at 264-68. In February 1994, the appellant plead guilty to the possession of cocaine in the Circuit Court for Prince George's County. *See id.* at 228, 721 A.2d at 260. Later in 1994, the appellant plead nolo contendere in the Circuit Court for Prince George's County to another charge of possession of cocaine. *See id.* The Court of Special Appeals noted that both of Skok's petitions "were based on careless procedural errors committed by the trial judge, not upon facts unknown to the

the court explained that the writ of error coram nobis may be granted only in situations where the "supposed error inheres in facts not actually in issue under the pleadings at trial, and unknown to the court when the judgment was entered, but which, if known, would have prevented the judgment."[114] Skok argued that the court's explanation was in direct contradiction to the Supreme Court's holding in *Morgan* that a writ of coram nobis could be issued even if the writ was not based on a fact unknown to the court when the judgment was entered.[115]

The Court of Special Appeals found Skok's reading of the holding in *Morgan* too expansive.[116] The *Skok* court recognized that Maryland law is in direct conflict with *Morgan* "insofar as *Morgan* allows the court to entertain a petition for a writ of coram nobis to consider facts known to the trial judge when the original judgment was entered."[117] The court pointed out, however, that the conflict between Maryland law and *Morgan* did not mean that the Maryland courts were required to follow *Morgan* or that prior Maryland decisions should be disregarded.[118] The *Skok* court explained that although Maryland courts are obligated to follow Supreme Court decisions that speak to federal constitutional principles,[119] in *Morgan*, the Supreme Court decided an issue of federal jurisdiction as opposed to an issue of federal constitutional principle.[120] Specifically, the *Morgan* court decided that the "All Writs" section of 28 U.S.C. § 1651(a) was broad enough to allow federal courts to issue writs of coram nobis in appropriate circumstances.[121]

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trial judge." *Id.* at 234, 721 A.2d at 263. The court explicitly stated that "[t]his is fatal to appellant's claim." *Id.*

113. *See id.* at 234-42, 721 A.2d at 263-67.

114. *Id.* at 234, 721 A.2d at 263 (quoting Jackson v. State, 218 Md. 25, 145 A.2d 234 (1958)).

115. *See id.* at 235, 721 A.2d at 264; *see also* United States v. Morgan, 346 U.S. 502, 508 (1954) (stating that the writ may be used to correct an error "of fact not apparent on the face of the record" (internal quotation marks omitted) (citation omitted)).

116. *Skok*, 124 Md. App. at 236, 721 A.2d at 264.

117. *Id.* at 240, 721 A.2d at 266.

118. *Id.*

119. *See id.* at 266-67, 721 A.2d at 240-41 (citing State v. Matusky, 343 Md. 467, 490, 682 A.2d 694, 705 (1996)).

120. *Id.*

121. *Id.* (recognizing that the *Morgan* court "decided only an issue of federal jurisdiction, i.e., whether the (all writs) section of 28 U.S.C. 1651(a) was broad enough to allow federal courts to issue writs of *coram nobis* under certain circumstances and, if so, under what circumstances").

d. Legislative Effects on Post-Conviction Remedies Including the Writ of Error Coram Nobis in Maryland.—In 1958, the Maryland General Assembly enacted the Post Conviction Procedure Act,[122] as an attempt to limit the ever-increasing caseload of the Court of Appeals by reducing the number of appeals arising from repeated collateral attacks on criminal convictions.[123] At the same time, the Act attempted to preserve, within clearly defined limits, appellate review for persons who are legally imprisoned.[124] The purpose of the Act was "to create a simple statutory procedure, in place of the common law habeas corpus and coram nobis remedies, for collateral attacks upon criminal convictions and sentences."[125] Furthermore, the Act was seen as providing for the first time "a statutory remedy under which a prisoner could collaterally challenge the conviction and sentence, or defective delinquency determination, which led to his incarceration."[126]

Under the Maryland Act,[127] all post-conviction proceedings, including petitions based on grounds heretofore only available under

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122. MD. ANN. CODE § 645A (1957 & Supp. 1963)).

123. *See* Tillet v. Warden of the Maryland House of Correction, 220 Md. 677, 679, 154 A.2d 808, 810 (1959) (recognizing that the enactment "manifest[s] an intention to put a stop to the endless repetition of the same grounds of collateral attack upon conviction").

124. *See* Carter v. Warden of Maryland House of Correction, 219 Md. 692, 693, 150 A.2d 242, 243 (1959) (stating that "the purpose of the Act is to provide only for those who have been 'convicted of a crime' and are 'incarcerated under sentence of death or imprisonment,' not those who have been released from confinement" (internal quotation marks omitted) (quoting MD. ANN. CODE § 645A)).

125. Gluckstern v. Sutton, 319 Md. 634, 658, 574 A.2d 898, 909-10 (1990) (citing Brady v. State, 222 Md. 442, 446-47, 160 A.2d 912 (1960); State v. D'Onofrio, 221 Md. 20, 28-29, 155 A.2d 643 (1959)).

126. *Id.* at 658, 574 A.2d at 909.

127. As originally enacted, the statute read, in relevant part:

> (a) *Appeal in lieu of former remedies; when denied.*—Any person convicted of a crime and incarcerated under sentence of death or imprisonment, . . . who claims . . . that the sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy, may institute a proceeding under this subtitle to set aside or correct the sentence, provided the alleged error has not been previously and finally litigated or waived in the proceedings resulting in the conviction, or in any other proceeding that the petitioner has taken to secure relief from his conviction.
>
> (b) *Time of filing; not substitute for remedies of trial proceedings; other common law statutory remedies superseded.*—The remedy herein provided is not a substitute for, nor does it affect any remedies which are incident to the proceedings in the trial court or before the trial magistrate, . . . or any remedy of direct review of the sentence or conviction. A petition for relief under this subtitle may be filed at any time. Hereafter no appeals to the Court of Appeals of Maryland in habeas corpus or coram nobis cases, or from other common law or statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except ap-

the writs of error coram nobis, may be brought in the lower court and are subject to appeal.[128] The writ of coram nobis may also be brought, however, outside the provisions of the Act, although if this is done, the question still remains as to whether there is a right of appeal.[129]

Thus, the Maryland Act does not abolish the common law petition for the writ of error coram nobis.[130] Instead, it sets up an alternative procedure under which applications for writs of error coram nobis may be treated either as they were prior to June 1, 1958, the date the Act was enacted, or as a proceeding under the Act.[131] If the applicant proceeds originally under the Act, the case will be heard in the court where the conviction took place,[132] and any person aggrieved by the order of a judge may apply to the Court of Appeals for leave to prosecute an appeal.[133] On the other hand, if the petition is heard as a coram nobis application, and if heard and denied, the question still remains whether there is any right to request leave to appeal to the Court of Appeals from such denial.[134]

The most recent cases in Maryland addressing the writ of error coram nobis have focused on this question. The uncertainty stems

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peals in such cases pending in the Court of Appeals in June 1, 1958, shall be processed in due course.

MD. ANN. CODE § 645A (1957 & Supp. 1959).

128. Art. 27, § 645I (recognizing that "[a]ny person . . . aggrieved by the order of the court or judge passed in accordance with this subtitle, may . . . apply to the Court of Special Appeals for leave to prosecute an appeal therefrom").

129. *See* Art. 27, § 645A(b) (stating that "[h]ereafter no appeals to the Court of Appeals in . . . coram nobis cases . . . shall be permitted or entertained, except appeals in such cases pending in the Court of Appeals on June 1, 1958"). *But see infra* notes 149-157 (discussing the question of whether there is a right of appeal in coram nobis cases).

130. *See* Brady v. State, 222 Md. 442, 447, 160 A.2d 912, 915-16 (1960) (stating that "the . . . [Post Conviction Procedure Act] did not abrogate the remedies formerly available under writs of habeas corpus and coram nobis and other common-law statutory remedies").

131. *Id.*; *see also* Skok v. State, 124 Md. App. 226, 721 A.2d 259 (1998) (treating the application for the writ of error coram nobis as it was treated prior to June 1, 1958); Hamilton v. Warden, 220 Md. 657, 152 A.2d 125 (1959) (treating the petition for the writ of error coram nobis as a petition under the Post Conviction Procedure Act).

132. *See* Rule 4-401 (stating that "[a] proceeding under the Uniform Post Conviction Procedure Act is commenced by the filing of a petition in the circuit court of the county where the conviction took place").

133. *See* Art. 27, § 645I (providing that any party aggrieved by the final trial court order in a proceeding under the Act could file an application for leave to appeal).

134. *See infra* notes 148-157 and accompanying text (discussing the issue of whether the right to appeal in coram nobis cases survived the adoption of the Post Conviction Procedure Act).

from a 1965 amendment to the original Act.[135] Originally, Section 645A(b) of the Maryland Post Conviction Procedure Act provided:

> Hereafter no appeals to the Court of Appeals of Maryland in habeas corpus or *coram nobis* cases, or from other common law or statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except appeals in such cases pending in the Court of Appeals on June 1, 1958, shall be processed in due course.[136]

In *Brady v. State*,[137] the Court of Appeals construed the aforementioned language as abolishing all appeals from coram nobis and habeas corpus decisions.[138] The court held that "[w]hile the . . . [Post Conviction Procedure Act] did not abrogate the remedies formerly available under writs of habeas corpus and coram nobis and other common law statutory remedies, it clearly took away the right of appeal from an order denying any of them."[139] Similarly, in *Cumberland v. Warden*,[140] the Court of Appeals announced that "[t]his court may no longer entertain an appeal from the denial of a petition for a writ of *habeas corpus*."[141]

However, in 1965, the Maryland General Assembly added new language to the portion of the Act relating to appeals in habeas corpus cases.[142] This new language provided that

> nothing in this subtitle shall operate to bar an appeal to the Court of Special Appeals (1) in a habeas corpus proceeding instituted under § 2-210 of Article 41 of this Code or (2) in any other proceeding in which a writ of habeas corpus is sought for any purpose other than to challenge the legality of a conviction of crime or sentence of death or imprisonment therefore, including confinement as a result of a proceeding under article 31B of this Code.[143]

According to the Court of Appeals, the amendment as outlined above was intended to authorize appeals in habeas corpus proceedings relat-

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135. *See infra* notes 142-147 and accompanying text (discussing the amendment to the Act and the Court of Appeals interpretation of the amendment).

136. MD. ANN. CODE § 645A(b) (1957 & Supp. 1963).

137. 222 Md. 442, 160 A.2d 912 (1960).

138. *Id.* at 447, 160 A.2d at 915-16.

139. *Id.*

140. 225 Md. 636, 171 A.2d 709 (1961).

141. *Id.* at 638, 171 A.2d at 709 (citation omitted).

142. *See* Act of April 8, 1965, ch. 442, 1965 Md. Laws 634.

143. *Id.*

ing to cases "other than" those challenging criminal convictions.[144] The Court of Appeals also recognized that the Act does not provide a remedy to a defendant who is no longer in custody, or is subject to conditions of probation or parole.[145] Specifically, a proceeding under the Post Conviction Procedure Act can only be brought by a "person convicted of a crime and incarcerated under sentence of death or imprisonment [or on parole or probation]."[146] Therefore, as the Court of Appeals recognized in *Fairbanks v. State*, common law remedies, including coram nobis, may be available for collateral attacks on prior convictions that no longer impose restraints on defendants.[147]

Although the Court of Appeals has not specifically addressed the validity of appeals from coram nobis decisions in light of the Act and its 1965 amendment,[148] the Court of Special Appeals, in *Jones v. State*,[149] concluded that the right of appeal in coram nobis cases survived the enactment of the Post Conviction Procedure Act.[150] The *Jones* court reached this conclusion by first recognizing that the Post Conviction Procedure Act was "intended to replace habeas corpus and coram nobis as a statutory remedy for collateral challenges to criminal judgments."[151] Next, the *Jones* court noted that in cases where the Post Conviction Procedure Act does not provide a remedy, such as habeas corpus cases "other than" those challenging criminal convictions, the Act as amended provided no reason for restricting appeals in these cases.[152] The *Jones* court determined that the same reasoning that was applied in *Gluckstern* to habeas corpus cases should also be applied to coram nobis cases.[153] Therefore, an appeal could be taken

144. Gluckstern v. Sutton, 319 Md. 634, 662, 574 A.2d 898, 911 (1990). The court stated: "In situations where the Post Conviction Procedure Act did not provide a remedy, and thus was not a substitute for habeas corpus, the enactment of the new statute provided no reason for restricting appeals in habeas corpus cases." *Id.* at 662, 574 A.2d at 912.

145. *See* Fairbanks v. State, 331 Md. 482, 493 n.3 629 A.2d 63, 68 n.3 (1993) (citing McMannis v. State, 311 Md. 534, 539-47, 536 A.2d 652 (1998)).

146. MD. CODE ANN., CRIMES & PUNISHMENTS, Art. 27, § 645A (1957).

147. *Fairbanks*, 331 Md. at 486, 724 A.2d at 65.

148. *See Ruby*, 353 Md. at 106 n.4, 724 A.2d at 676 n.4 (stating that the Court of Appeals "has yet to address the correctness of the Court of Special Appeals' decision in *Jones*," which held that the right to appeal in coram nobis cases survived the adoption of the Post Conviction Procedure Act).

149. 114 Md. App. 471, 691 A.2d 229 (1997).

150. *Id.* at 478-79, 691 A.2d at 232.

151. *Id.* at 478, 691 A.2d at 232.

152. *Id.* (citing Gluckstern v. Sutton, 319 Md. 634, 662, 574 A.2d 898, 912 (1990)).

153. *Id.* ("We see no justifiable reason for denying a right of appeal to a coram nobis petition when a right of appeal is avoidable to those seeking redress under habeas corpus.").

from a coram nobis decision notwithstanding the Post Conviction Procedure Act.[154]

In 1998, one year after *Jones*, the Court of Special Appeals again considered the issue of whether the right to appeal in coram nobis cases survived the adoption of the Post Conviction Procedure Act in *Skok v. State*.[155] In *Skok*, the Court of Special Appeals reiterated its holding in *Jones* that the right to appeal in coram nobis cases survived the enactment of the Post Conviction Procedure Act.[156] Thus, *Jones* and *Skok* set the stage for the court's decision in *Ruby*.

3. The Court's Reasoning.—In *Ruby*, the Court of Appeals held that the Court of Special Appeals did not have jurisdiction to determine the propriety of the trial court's grant of the petition for a writ of error coram nobis.[157] Specifically, the court determined that the State's failure to file an appeal of the trial court's grant of a petition for writ of error coram nobis in the separate civil proceeding terminated its right of appeal and that the appellate court acquired no jurisdiction to hear that final civil order in that civil case.[158] The court further observed that the Court of Special Appeals had no jurisdiction to consider the propriety of the grant of the civil writ in the criminal case.[159]

The Court of Appeals began its analysis with a historical survey of the writ of error coram nobis.[160] The court acknowledged previous decisions of the Court of Appeals and the Court of Special Appeals involving the writ of error coram nobis.[161] The *Ruby* court also traced the *Madison* court's decision of the use and the application of the writ of error coram nobis,[162] and then highlighted the main theme of the Maryland cases that have considered the writ—that the "writ of error

154. *See id.* ("The question remains whether the right of appeal in coram nobis actions survived the adoption of Art. 27, § 645A(e), as amended in 1965. We hold that it does.").

155. 124 Md. App. 226, 721 A.2d 259 (1998).

156. *Id.* at 233, 721 A.2d at 263 ("To the extent that *coram nobis* relief may be available in certain instances, appellant has the right to appeal the denial of his request that the [trial] court issue a writ of *coram nobis*.").

157. *Ruby*, 353 Md. at 113, 724 A.2d at 680.

158. *Id.*, 724 A.2d at 679.

159. *Id.*

160. *Id.* at 104-06, 724 A.2d at 675-76.

161. *See id.* at 105, 724 A.2d at 676 (citing Johnson v. State, 215 Md. 333, 336, 138 A.2d 372, 373 (1958); Bernard v. State, 193 Md. 1, 3-4, 65 A.2d 297, 298 (1949); Keane v. State, 164 Md. 685, 689-93, 166 A. 410, 411-13 (1933); Hawks v. State, 163 Md. 30, 31-32, 157 A. 900, 901 (1932); Jones v. State, 114 Md. App. 471, 475, 691 A.2d 229, 230-31 (1996)). The court also recognized the Supreme Court's opinion in *United States v. Morgan*, 346 U.S. 502 (1954). *Id.*

162. *Id.* (citing Madison v. State, 205 Md. 425, 432, 109 A.2d 96, 99 (1954)).

coram nobis is a common law tool primarily used to correct factual errors by a court."[163]

The court continued its discussion of the writ of error coram nobis by recognizing that Maryland's enactment of the Post Conviction Procedure Act has diminished the usefulness of the writ of error coram nobis to some extent.[164] Nevertheless, the court concluded that "like a habeas corpus proceeding and a proceeding under the Act, [a writ of error coram nobis] still may be used to collaterally challenge a criminal judgment."[165]

The *Ruby* court next discussed the nature of a collateral challenge to demonstrate that a writ of error coram nobis is a civil matter procedurally independent of the underlying judgment being contested.[166] The court observed that "[a] collateral challenge, by its very nature, is a separate and distinct civil procedure by which a defendant may challenge his or her conviction, sentence, or imprisonment."[167] The court also recognized that "at common law, a proceeding on a writ of error *coram nobis* was a civil matter procedurally independent of the underlying judgment being contested."[168] The court cited, as additional support for this proposition, a number of decisions from other jurisdictions that have concluded that a proceeding on a writ of error coram nobis remains a civil matter independent of the underlying case even though its resolution may affect the underlying case.[169]

The court then acknowledged that the federal circuits are split on the issue of whether a proceeding on a writ of error coram nobis is

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163. *Id.* at 104, 724 A.2d at 675.

164. *Id.* at 105-06, 724 A.2d at 676. The court explained that although the Post Conviction Procedure Act was enacted "to create a single statutory procedure, in place of common law habeas corpus and coram nobis remedies, for collateral attacks upon criminal convictions and sentences," the Court of Special Appeals had, in *Jones v. State*, determined that "the right of appeal in coram nobis actions survived the adoption of [the Act]" because the Act did not provide for a remedy "when the defendant is not incarcerated or subject to parole or probation." *Id.* at 106 n.4, 724 A.2d at 676 n.4 (internal quotation marks omitted) (quoting Gluckstern v. Sutton, 319 Md. 634, 658, 574 A.2d 898, 909 (1990)) (citing Jones v. State, 114 Md. App. 471, 478, 691 A.2d 229, 232 (1996)). The *Ruby* court also noted that the correctness of the *Jones* decision has never been addressed by the Court of Appeals, and declined to do so in the present case because the issue was not properly before the Court of Special Appeals. *Id.*

165. *Id.* at 106, 724 A.2d at 676.

166. *Id.* at 107, 724 A.2d at 677.

167. *Id.* (citing State Bar Ass'n, Inc. v. Kerr, 272 Md. 687, 689-90, 326 A.2d 180, 181 (1974)).

168. *Id.* (citing United States v. Hayman, 342 U.S. 205, 221 n.36 (1952); State v. King, 380 P.2d 325, 326 (1963); State v. Turner, 231 N.W.2d 345, 349 (1975); People v. Holland, 209 N.Y.S.2d 58, 59 (1960)).

169. *Id.* at 108, 724 A.2d at 677; *see also supra* note 38 (discussing several of the cases cited by the *Ruby* court).

civil in nature.[170] The court hinted that the confusion in the federal circuits has been caused by footnote four of the Supreme Court's opinion in *Morgan*.[171] The court observed that "[t]he paradox in the footnote is that the Supreme Court first contrasted a writ of error coram nobis with a habeas corpus proceeding, which is historically a separate civil procedure, but then in the same footnote likened the writ to a civil post conviction action under section 2255."[172] The court concluded that despite the disagreements among the federal circuits, "no confusion as to the nature of a writ of error *coram nobis* exists in this jurisdiction."[173] According to the court, the writ of error coram nobis in Maryland remains a civil matter procedurally independent of the action from which it arose.[174]

The court then reexamined the effect of the Post Conviction Procedure Act on the availability of the common law writ of error coram nobis.[175] In recognizing that Maryland adopted England's common law, subject to a constitutional conflict, legislative change, or judicial modification, the court noted that the General Assembly's enactment of the Act limited the right to appeal in common law habeas corpus and coram nobis proceedings to defendants who are in custody or on probation.[176] The court reasoned, however, that "the Act is not a substitute for common law remedies when, . . . the defendant *is not in custody or on probation or parole.*"[177] The court thus concluded that "[t]he original common law remedies with their common law attributes continue to be viable."[178]

The court addressed the facts of the case before it and concluded that because the state failed to file any appeal of the grant of the writ of error coram nobis in the civil case, that decision was final.[179] The court recognized that during the petitioner's belated criminal appeal, the State filed a motion to dismiss.[180] The court criticized the State's

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170. *Ruby*, 353 Md. at 109-10, 724 A.2d at 677-78; *see also supra* note 40 and accompanying text (discussing this split within the federal circuits).

171. *See Ruby*, 353 Md. at 109-10, 724 A.2d at 678 ("Commentators note that the split among the federal circuits, to some extent, has been caused by footnote four in *Morgan* . . . ." (internal citation omitted)); *see also supra* notes 55-70 and accompanying text (discussing the Supreme Court's opinion in *Morgan*).

172. *Ruby*, 353 Md. at 110, 724 A.2d at 678.

173. *Id.* at 111, 724 A.2d at 678.

174. *Id.*, 724 A.2d at 678-79.

175. *Id.*, 724 A.2d at 678.

176. *Id.*

177. *Id.* (citing Fairbanks v. State, 331 Md. 482, 492 n.3, 629 A.2d 63, 68 n.3 (1993)).

178. *Id.*

179. *Id.*, 724 A.2d at 679 ("The correctness of the trial court's grant of the writ of error *coram nobis*, after the time for appeal has passed, is no longer appealable.").

180. *Id.* at 112, 724 A.2d at 679.

motion as an attempt to challenge the grant of the writ of error coram nobis.[181] The court reasoned that by claiming that the trial court erred in granting the writ of error coram nobis, the State was using a motion to dismiss a criminal appeal to attack a judgment rendered in a civil case.[182]

Finally, the court addressed the procedural grounds for vacating the intermediate appellate court's judgment.[183] The court observed that "[t]he State's motion to dismiss . . . [Ruby's] appeal is where the confusion began."[184] The court cited Maryland Rule 8-202(a)[185] as controlling and stated that:

> there is no record in the docket entries noting an appeal of the trial court's grant of the petition for writ of error coram nobis in the civil proceeding. Maryland Rule 8-202(a) mandates that a "notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." Failure of an aggrieved party to so file terminates its right of appeal and the appellate court acquires no jurisdiction to hear that matter.[186]

Considering the State's failure to appeal the final order of the circuit court's issuance of the writ of error coram nobis, the court held that the intermediate appellate court "did not have jurisdiction to address the propriety of that final civil order even in that civil case."[187] Moreover, the Court of Special Appeals did not have jurisdiction "to consider the propriety of the grant of the civil writ in . . . [Ruby's] belated appeal of the denial of his motion for a new trial in the criminal case."[188]

4. Analysis.—In *Ruby,* the Court of Appeals considered whether the intermediate appellate court acquired jurisdiction to consider the correctness of a circuit court's final order when the aggrieved party failed to file an appeal from that order.[189] The Court of Appeals determined that the Court of Special Appeals did not have jurisdiction to address the propriety of the circuit court's grant of the petition for

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181. *Id.*
182. *Id.*
183. *Id.* at 113, 724 A.2d at 679.
184. *Id.*
185. MD. RULE 8-202(a).
186. *Ruby,* 353 Md. at 113, 724 A.2d at 679 (quoting MD. RULE 8-202(a)) (citing Houghton v. County Comm'rs, 305 Md. 407, 413, 504 A.2d 1145, 1148 (1986)).
187. *Id.*
188. *Id.*
189. *Id.* at 104, 724 A.2d at 675; *see also supra* notes 158-160 and accompanying text.

writ of error coram nobis when the State did not note an appeal of the grant of that petition in the civil case.[190]

This result is an intuitive response to the issue presented; the failure of an aggrieved party to file a timely appeal terminates its right of appeal and the appellate court acquires no jurisdiction to hear that matter.[191] Several significant tasks, however, were accomplished through the process of reaching this procedural conclusion. First, the court reaffirmed the existence of the common law writ of error coram nobis. Also, it refused to expand the writ beyond its common law purpose, thus adopting a narrower interpretation than the federal courts and foreshadowing dim prospects for its expansion in Maryland. Finally, it clarified that the writ of error coram nobis in Maryland is in the nature of a civil matter, and as such is consistent with Maryland's steadfast commitment to the continued viability of common law remedies with their common law attributes. In accomplishing these tasks, the *Ruby* decision confirmed that, in Maryland, the common law writ of error coram nobis remains available as a separate and distinct civil procedure to challenge collaterally a criminal judgment, and continues to be interpreted within its traditional common law confines.

a. Procedural Grounds for Reversal.—The Court of Appeals's decision to overturn the ruling of the Court of Special Appeals was based on solid procedural grounds, and the court applied the proper standard of appellate review.[192] Ruby filed a petition for writ of error coram nobis, requesting as relief a belated appeal of the denial of his motion for a new trial in his original criminal case.[193] The petition was assigned a civil case number, and was dealt with as a civil mat-

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190. *Ruby*, 353 Md. at 113, 724 A.2d at 680; *see also supra* notes 158-160 and accompanying text.

191. *Ruby*, 353 Md. at 113, 724 A.2d at 679; *see also* Jones v. Warden, 210 Md. 666, 667, 124 A.2d 283, 283 (1956) (finding that "[a]lthough the petitioner could have appealed . . . from the denial of the writ of error *coram nobis* . . . the record shows that no appeal was taken as to either, and the correctness of the Court's action in denying [it] [ ] is not before us" (internal citations omitted) (citing Bernard v. State, 193 Md. 1, 65 A.2d 297 (1949))).

192. The court's procedural determination is also consistent with its decision in *Johns v. Warden*, 210 Md. 666, 124 A.2d 283 (1956). In *Johns*, the court considered whether the circuit court's denial of a tri writ—a petition for habeas corpus, a petition for a writ of error coram nobis, and a motion to strike out the judgment and sentence—was proper. *Id.* at 667, 124 A.2d at 283. Relying on its decisions in *Madison* and *Bernard*, the *Johns* court affirmed the lower court's decision, reasoning that "[a]lthough the petitioner could have appealed from the refusal to strike the judgment . . . and from the denial of the writ of error *coram nobis* . . . the record shows that no appeal was taken as to either, and the correctness of the Court's action in denying them is not before us." *Id.* at 667, 124 A.2d 283 (citations omitted).

193. *See Ruby*, 353 Md. at 111, 724 A.2d at 679.

ter.[194] The circuit court granted Ruby the writ in the civil case, which directed the criminal court to afford him permission to file a belated appeal in the criminal case.[195] The State failed to file an appeal of the circuit court's grant of the writ of error coram nobis in the civil case.[196] Therefore, the circuit court's decisions were final, and the correctness of the circuit court's grant of the writ of error coram nobis was, after the time for appeal had passed, no longer appealable.[197]

Instead of appealing from the grant of the writ of error coram nobis in the civil case, the State challenged the grant of the writ by filing a motion to dismiss Ruby's belated criminal appeal with the Court of Special Appeals in the criminal case.[198] The intermediate appellate court granted the State's motion, reasoning that it did not have jurisdiction to entertain the belated appeal granted Ruby pursuant to the writ of error coram nobis.[199] The intermediate appellate court explained that

> [t]he trial court's grant of a writ of error *coram nobis* was inappropriate because the error . . . [petitioner] relies upon to validate the issuance of the writ does not relate to any fact not known at either the hearing on his motion for new trial or at [petitioner]'s original trial that would have affected the entry of judgment.[200]

The Court of Appeals, however, correctly noted that the Court of Special Appeals did not have jurisdiction to determine the propriety of the trial court's grant of the petition for writ of error coram nobis.[201] Considering that Maryland Rule 8-202(a) mandates that a "notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken"[202] and that the State did not file an appeal,[203] it was improper for the Court of Special Appeals to dismiss the belated appeal in the criminal case, holding that it did not have jurisdiction to hear the appeal because the circuit court in the

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194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.* (recognizing that the State "failed to file an appeal in the . . . civil case," therefore that decision was final and "the correctness of the trial court's grant of the writ of error *coram nobis* was, after the time for appeal had passed, no longer appealable").

198. *See id.* at 112, 724 A.2d at 679.

199. Ruby v. State, 121 Md. App. 168, 172, 708 A.2d 1080, 1082 (1998).

200. *Id.* at 177, 708 A.2d at 1084.

201. *See Ruby*, 353 Md. at 112-13, 724 A.2d at 679.

202. *Id.* at 113, 724 A.2d at 679 (quoting MD. RULE 8-202(a)).

203. *Id.*

civil case improperly issued the writ of error coram nobis.[204] Thus, the Court of Appeals's decision to vacate the judgment and to remand the case to the Court of Special Appeals was procedurally sound.

b. The Availability of the Writ of Error Coram Nobis.—At first glance, the court's holding in *Ruby* appears solidly based on Maryland Rule 8-202(a).[205] Upon closer inspection, however, it appears that the Court of Appeals arrived at the proper result by first recognizing that the writ of error coram nobis is still available in Maryland.[206] The *Ruby* court's acknowledgement of the existence of the writ is just one example of Maryland's firm dedication to the ongoing viability of common law remedies.[207] For example, in *State v. Wiegmann*,[208] the Court of Appeals refused to follow the modern trend of statutorily abolishing the common law privilege permitting persons to resist an illegal warrantless arrest, because it was questionable whether the remaining remedies were adequate.[209] Similarly, in *Hammond v. State*,[210] the Court of Appeals relied on common law precedent and the legislature's silence to interpret three maiming statutes together in accordance with the common law requirement that the maiming,

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204. *See id.* (finding that "because the State failed to appeal the final order of the circuit court issuing the writ of error *coram nobis*, the Court of Special Appeals did not have jurisdiction to address the propriety of that final civil order even in that civil case").

205. *See id.* (recognizing that because "Maryland Rule 8-202(a) mandates that a 'notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken,'" the state's failure "to appeal the final order of the circuit court issuing the writ of error *coram nobis*" terminated its right to appeal and the appellate court acquired no jurisdiction to hear that matter).

206. *See id.* at 105, 724 A.2d at 676 (recognizing the existence of the writ in Maryland).

207. *See, e.g.*, Harrison v. Board of Educ., 295 Md. 442, 456 A.2d 894 (1983) (declining to abandon the common law doctrine of contributory negligence in favor of comparative negligence because doing so would involve fundamental and basic public policy considerations properly to be addressed by the legislature); Felder v. Butler, 292 Md. 174, 183-84, 438 A.2d 494, 499-500 (1981) (declining to alter the common law rule relating to tort actions against licensed vendors of intoxicating liquors for injuries negligently caused by an intoxicated patron to an innocent third party); Murphy v. Baltimore Gas & Elec., 290 Md. 186, 195, 428 A.2d 459, 465 (1981) (refusing to change the common law principles governing the duty of care owed a trespasser by a property owner).

208. 350 Md. 585, 714 A.2d 841 (1998).

209. *Id.* at 605-07, 714 A.2d at 851-52. The court in *Wiegmann* explained that the decision to modify judicially the common law must be cased on "whether the existing rule . . . 'is unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people.'" *Id.* at 605, 714 A.2d at 851 (quoting Gaver v. Harrant, 316 Md. 17, 29, 557 A.2d 210, 216 (1989)). Because of the lack of legislative pronouncement on the issue, the court refused to answer this question in the affirmative, and included that any change to the common law on this issue would be "best left to Legislature and its primary power . . . to declare the public policy of . . . [Maryland]." *Id.* at 607, 714 A.2d at 851-52.

210. 322 Md. 451, 588 A.2d 345 (1991).

disfigurement, or disablement be permanent.[211] These examples illuminate Maryland's "generally accepted rule of law that statutes are not presumed to repeal the common law 'further than is expressly declared, and that a statute, made in the affirmative without any negative expressed or implied, does not take away the common law.'"[212]

As early as 1932, the Court of Appeals recognized the diminished usefulness of the writ of error coram nobis.[213] The court in *Hawks* attributed the potential demise of the writ to the availability of obtaining the same results by a motion addressed to the court asking it to correct its own record.[214] Similarly, the *Keane* court recognized that the writ's efficacy and usefulness in some states had been destroyed by statute or modified to some extent by statute or practice.[215] More than twenty years later, however, the *Madison* court dispelled any beliefs that the writ of error coram nobis was not available in Maryland.[216]

It is significant to note, however, that the revitalization of the writ by the *Madison* court was almost short-lived with the Maryland General Assembly's enactment of the Post Conviction Procedure Act in 1958.[217] The purpose of the Act "was to create a simple statutory procedure, in place of the common law habeas corpus and coram nobis remedies, for collateral attacks upon criminal convictions and sentences."[218] This language could conceivably be read to suggest that the writ of error coram nobis was no longer available to challenge collaterally a criminal judgment. The Court of Appeals in *Ruby*, however, strongly alluded to the continued existence of the writ of error

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211. *Id.* at 458-59, 588 A.2d at 348 ("We have no reason to assume that when the Legislature created the offense of assault with intent to maim, disfigure, or disable . . . and [subsequently] reviewed the statute . . . it was not fully aware of the requirement at the common law that maiming, disfigurement, or disablement be permanent.").

212. Robinson v. State, 353 Md. 683, 693, 728 A.2d 698, 702 (1999) (quoting Lutz v. State, 167 Md. 12, 15, 172 A. 354, 356 (1934)).

213. *See* Hawks v. State, 162 Md. 30, 32, 157 A. 900, 901 (1932) (noting that "[t]he writ [of coram nobis] has largely fallen into disuse").

214. *Id.*

215. Keane v. State, 164 Md. 685, 689, 166 A. 410, 411 (1933) (recognizing that the writ's "efficacy and usefulness in this country have in some states been destroyed by statute or practice, and in all states to some extent modified by statute or practice").

216. *See* Madison v. State, 205 Md. 425, 432, 109 A.2d 96, 99 (1954) (observing that "[w]hile the occasions for [the writ's] use have been infrequent, no one has doubted its availability. . . . [i]t is still available in Maryland in both civil and criminal cases").

217. *See* MD. CODE ANN., CRIMES & PUNISHMENTS § 645A (1958 & Supp. 1963)).

218. *See* Gluckstern v. Sutton, 319 Md. 634, 658, 574 A.2d 898, 909-10 (1990) (citing Brady v. State, 222 Md. 442, 446-47, 160 A.2d 912 (1960); State v. D'Onofrio, 221 Md. 20, 288-29, 155 A.2d 643 (1959)).

coram nobis in Maryland by explaining its enduring allegiance to the continued viability of common law remedies.[219]

The *Ruby* court also reaffirmed the existence of the writ of error coram nobis by clarifying the scope of the Post Conviction Procedure Act.[220] Remedy under the Post Conviction Procedure Act is available only if the defendant is in custody or subject to conditions of parole or probation.[221] A defendant, however, who is no longer in custody is not thereby divested of an opportunity to challenge a prior conviction.[222] Common law actions, including the writ of error coram nobis, may still be available.[223] The *Ruby* court gave deference to the Post Conviction Procedure Act by conceding that Maryland adopted England's common law, subject to constitutional conflict, legislative change, or judicial modification.[224] Nevertheless, in light of the Act, the *Ruby* court expressly stated that "the common law writ of error *coram nobis* is a procedure still available in this State."[225]

The Court of Special Appeals's coram nobis jurisprudence—that the right to appeal in coram nobis cases has survived the enactment of the Post Conviction Procedure Act—is also demonstrative of Maryland's devotion to the continued availability of common law remedies with their common law attributes. Prior to the Court of Appeals's decision in *Ruby*, a line of Court of Special Appeals decisions addressed the exact question of whether the right to appeal in coram nobis cases survived the Act.[226] In *Jones v. State*,[227] the Court of Special Appeals held that an appeal could lie from the denial of a writ of error coram nobis.[228] Similarly, in *Skok v. State*,[229] the intermediate appellate court perceived no error in the chancellor granting a belated appeal from

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219. *Ruby*, 353 Md. at 111, 724 A.2d at 678 (stating that "the original common law remedies with their common law attributes continue to be viable" in Maryland).

220. *Id.*

221. *See id.* (citing *Sutton*, 319 Md. at 658, 574 A.2d at 908).

222. *See id.*

223. *See id.* (citing Fairbanks v. State 331 Md. 482, 492 n.2, 629 A.2d 63, 68 n.3 (1993)).

224. *Id.*

225. *Id.* at 105, 724 A.2d at 676.

226. *See supra* notes 148-157 and accompanying text (discussing Court of Special Appeals cases dealing with the issue of whether the right to appeal in coram nobis cases survived the enactment of the Post Conviction Procedure Act).

227. 114 Md. App. 471, 691 A.2d 229 (1997).

228. *Id.* at 478, 691 A.2d at 232; *see supra* notes 150-155 and accompanying text (discussing the *Jones* court's decision that the right of appeal in coram nobis cases survived the enactment of the Post Conviction Procedure Act).

229. 124 Md. App. 226, 721 A.2d 259 (1998).

his order denying appellant coram nobis.[230] The Court of Special Appeals has concluded that there is no "justifiable reason for denying a right of appeal in a coram nobis petition when the right of appeal is available to those seeking redress under habeas corpus."[231] The right of further review, reasoned the Court of Special Appeals, "ought not depend upon the name of the vehicle bringing one to the tribunal."[232]

The *Ruby* court properly declined to address the correctness of the Court of Special Appeals's decision in *Jones*, because the issue was not properly before it.[233] It is likely, however, that the Court of Appeals will eventually find that the right of appeal in coram nobis cases survived the adoption of the Act, even though it has held otherwise in previous cases.[234] The Court of Appeals has consistently demonstrated its commitment to the continued viability of common law remedies with their common law attributes,[235] and at common law the right to appeal existed in coram nobis cases.[236]

c. The Scope of the Writ of Error Coram Nobis.—The *Ruby* court's refusal to broaden the writ beyond its traditional common law purpose—to correct factual errors by a court—evidences little prospect for future expansion of the writ. While the federal courts allow movants to use the writ of error coram nobis to correct constitutional or other fundamental errors as well as traditional errors of fact,[237] Maryland continues to adhere to the purpose of the writ, as it existed when Maryland adopted the Common Law of England on July 4, 1776.[238] The purpose of the writ at common law was to bring before the court facts, which were not brought into issue at the trial of the

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230. *See supra* notes 156-157 and accompanying text (reiterating the holding in *Jones* that the right to appeal in coram nobis cases survived the enactment of the Post Conviction Procedure Act).

231. *Jones*, 114 Md. App. at 478, 691 A.2d at 232.

232. *Id.*

233. *Ruby*, 353 Md. at 106 n.4, 724 A.2d at 676 n.4 (stating that "[t]his Court has yet to address the correctness of the Court of Special Appeals' decision in *Jones* and we do not do so now because . . . the issue is not properly before us").

234. *See* Brady v. State, 222 Md. 442, 447, 160 A.2d 912, 915-16 (1960) (recognizing that the adoption of the Post Conviction Procedure Act abolished appeals in coram nobis cases).

235. *See supra* notes 205-236 and accompanying text (discussing Maryland's allegiance to the continued availability of common law remedies with their common law attributes).

236. *See supra* notes 78-120 and accompanying text (granting appeals in coram nobis cases prior to the adoption of the Post Conviction Procedure Act).

237. *See supra* note 71 and accompanying text (discussing the expansion of the scope of the writ in federal courts beyond its traditional common law limits).

238. *Ruby*, 353 Md. at 106, 724 A.2d at 675-76.

case, and which were material to the validity and regularity of the proceedings, and which, if known by the court, would have prevented the judgment.[239]

The common law purpose of the writ of error coram nobis has been challenged on numerous occasions in Maryland—to no avail.[240] The most notable challenge has been the petition for the writ of error coram nobis, alleging false testimony by the prosecuting witness.[241] In *Keane*, the Court of Appeals refused to expand the common law purpose of the writ to "permit a review of the evidence given in connection with the issues actually tried, to determine whether witnesses who actually testified before a jury sworn on those issues testified falsely."[242] The *Keane* court explained that the common law and modern purpose of the writ of error coram nobis was "to determine whether facts existed which were not known to the court at the trial and not in issue under the pleadings, but which, if known, would have prevented the judgment which actually was entered from being entered."[243]

The Court of Appeals continued to adhere to the common law purpose of the writ of error coram nobis when it treated the motion to strike out judgment and sentence based on false testimony in *Madison* as a petition for a writ of error coram nobis.[244] Following *Keane*, the *Madison* court explained that

> it is appropriate to say that *coram nobis* will not lie (1) to correct an issue of fact which has been adjudicated, even though wrongly determined, or (2) to determine whether any witnesses testified falsely at the trial, or (3) to present newly discovered evidence, or (4) to strike out a conviction on the ground that the prosecution was mistaken in his identification of the accused as the person who committed the crime.[245]

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239. *See id.* at 105, 724 A.2d at 675-76 (noting that the purpose of the writ at common law was "to bring before the court facts which were not brought into issue at the trial of the case, and which were material to the validity and regularity of the proceedings, and which, if known by the court, would have prevented the judgment" (internal quotation marks omitted) (quoting Madison v. State, 205 Md. 425, 432, 109 A.2d 96, 99 (1954))).

240. *See supra* notes 83-121 and accompanying text (discussing various unsuccessful challenges to the common law scope of the writ in Maryland).

241. *See supra* notes 83-106 and accompanying text (discussing unsuccessful petitions for the writ of error coram nobis, alleging false testimony by the prosecuting witness).

242. Keane v. State, 164 Md. 685, 689, 166 A. 410, 411 (1933).

243. *Id.*

244. Madison v. State, 205 Md. 425, 431, 109 A.2d 96, 99 (1954).

245. *Id.* at 432, 109 A.2d at 99.

The parameters of the writ as outlined by the Court of Appeals in *Madison* in 1954 are consistent with the scope of the writ as it existed at common law—to correct errors of fact.[246] During the same year, however, that the Court of Appeals limited the scope of the writ in *Madison*, the Supreme Court in *Morgan* broadened the scope of the writ in federal courts.[247] Today, the federal courts permit the issuance of the writ to correct constitutional or other fundamental errors as well as traditional errors of fact.[248] The *Ruby* court recognized the Court of Appeals's 1954 *Madison* decision as the most thorough discussion of the purpose of the writ of error coram nobis in Maryland,[249] thus demonstrating its desire to adhere to prior law on this issue rather than to invoke new, more recent approaches adopted by other jurisdictions. Thus, the Court of Appeals's jurisprudence, up to and including the *Ruby* decision, foreshadows the dim prospects in Maryland of future expansions of the writ of error coram nobis beyond its traditional common law limits.

d. The Civil Nature of the Coram Nobis Proceeding.—The most significant aspect of the *Ruby* decision is the court's formal announcement that a petition for "a writ of error *coram nobis* remains a civil matter in Maryland, independent of the underlying action from which it arose."[250] At common law, the petition for the writ of error coram nobis was a separate civil proceeding.[251] Therefore, the court's announcement is not surprising considering Maryland's unwavering faithfulness to the availability of common law remedies with their common law attributes.[252]

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246. *Id.*

247. *See* United States v. Morgan, 346 U.S. 502, 512 (1954) (approving the practice of lower federal courts granting writs of error coram nobis to protect broad constitutional guarantees); *see also supra* notes 106-107 and accompanying text.

248. *See supra* note 71 and accompanying text (discussing the expansion of the purpose of the writ in federal courts beyond its traditional common law limits).

249. *Ruby*, 353 Md. at 105, 724 A.2d at 675 (noting that the Court of Appeals has "expressly recognized [the] use and availability [of the writ of error coram nobis] in *Madison*").

250. *Id.* at 111, 724 A.2d at 678-79.

251. *Id.* at 107, 724 A.2d at 677 (stating that "[a]t common law, a proceeding on a writ of error *coram nobis* was a civil matter procedurally independent of the underlying judgment being contested" (citing United States v. Hayman, 342 U.S. 205, 221 n.36 (1952))); *see also* State v. Turner, 231 N.W.2d 345, 349 (1975) (stating that the "writ of error coram nobis is a common law civil proceeding applied in both civil and criminal judgments" (citations omitted)); State v. King, 380 P.2d 325, 326 (1963) (stating that "under the common law . . . proceedings upon application for a writ of *coram nobis* are regarded as civil in character" (internal citations omitted)).

252. *See Ruby*, 353 Md. at 111, 724 A.2d at 678 (stating that the "original common law remedies with their common law attributes continue to be viable").

The civil nature of the writ is not unique to Maryland.[253] Most other jurisdictions agree that a proceeding on a writ of error coram nobis remains a civil matter independent of the underlying judgment being contested.[254] In the federal courts, however, the modern status of the writ as a civil or criminal proceeding is uncertain.[255] As the Court of Appeals in *Ruby* noted, the tension among the federal circuits relates to the *Morgan* footnote's paradoxical language.[256] Although this inconsistency may have perplexed the federal courts,[257] Maryland's dedication to the continued existence of common law remedies with their common law attributes has been left intact.[258] The Court of Appeals in *Ruby* explicitly stated that "[n]otwithstanding any disagreements among the courts of the federal circuits, no confusion as to the nature of a writ of error *coram nobis* exists in this jurisdiction . . . . [A] writ of error *coram nobis* remains a civil matter in Maryland, independent of the underlying action from which it arose."[259]

5. Conclusion.—In *Ruby*, the Court of Appeals held that the Court of Special Appeals did not have jurisdiction to determine the propriety of the trial court's grant of the common law writ of error coram nobis in Ruby's belated appeal of the denial of his motion for a new trial in the criminal case. In so doing, the court recognized that the writ of error coram nobis still exists in Maryland, and is limited in scope to its traditional common law confines. The court also clarified that a proceeding on the writ is, as it was at common law, a civil matter

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253. *Id.* at 108-09, 724 A.2d at 677 (recognizing that "[m]ost other jurisdictions agree that a proceeding on a writ of error *coram nobis* remains a civil matter independent of the underlying case"); *see also supra* notes 38-39 and accompanying text (discussing the nature of the proceeding on the writ of error coram nobis outside of Maryland).

254. *See Ruby*, 353 Md. at 108-09, 724 A.2d at 677 (citing cases that have concluded that a "proceeding on a writ of *coram nobis* [is] a civil matter independent of the underlying case"); *see also supra* note 38 and accompanying text (same). *But see supra* note 39 and accompanying text (citing cases that have determined that a coram nobis proceeding is part of the original criminal case rather than a separate civil proceeding).

255. *See Ruby*, 353 Md. at 109, 724 A.2d at 677-78; *see also supra* note 40 and accompanying text (discussing the split in the federal courts on the issue of whether coram nobis is civil or criminal in nature).

256. *See Ruby*, 353 Md. at 109-10, 724 A.2d at 678; *see also supra* notes 63-70 and accompanying text (discussing the language of footnote four of the *Morgan* decision).

257. *See Ruby*, 353 at 109, 724 A.2d at 677-78 (noting that "[t]he federal circuits are split on . . . [the] issue" of whether error coram nobis is civil or criminal in nature); *see also supra* note 40 and accompanying text (discussing the split in the federal courts on the issue of whether coram nobis is civil or criminal in nature).

258. *See Ruby*, 353 Md. at 111, 724 A.2d at 678 (stating that "[t]he original common law remedies with their common law attributes continue to be viable").

259. *Id.* at 110-11, 724 A.2d at 678-79.

independent of the underlying judgment being contested. Thus, *Ruby* represents a confirmation of Maryland's steadfast commitment to the continued viability of common law remedies with their common law attributes and its commitment to procedural accuracy in applying the writ.

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III. COMMERCIAL LAW

A. "Tender of Delivery" for Article 2 Limitations Purposes Is Not Necessarily Contingent Upon Seller's Satisfaction of Testing Obligations

In *Washington Freightliner v. Shantytown Pier*,[1] the Court of Appeals held that a breach of implied warranty claim brought by a buyer of marine engines was time-barred under section 2-725 of the Maryland Code's Commercial Law Article[2] because although the action was filed within four years of the date of testing of the engines, it was not filed within four years of the seller's physical delivery of the engines for installation.[3] The court explained that the statute of limitations begins to run upon "tender of delivery."[4] In defining "tender of delivery," the court applied the general rule that tender of delivery occurs, and section 2-725 begins to run, when a seller of goods makes physical delivery to the buyer.[5] The court did not postpone the running of the statute of limitations until after the seller had completed its testing obligations under the contract.[6] In so finding, the court formulated a rule that will apply generally to contracts for sale unless the contracts specifically reflect the parties' intent to postpone delivery until goods are tested and found to be nondefective.[7]

In so developing this rule, however, the court failed to inquire into the subjective state of mind of the seller, a consideration required by section 2-503 of Maryland's Commercial Law Article.[8] Despite this problematic reasoning, the case yields a desirable rule that furthers the purpose of section 2-725: to give sellers clear notice of the date upon which they are released from liability for implied warranty

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1. 351 Md. 616, 719 A.2d 541 (1998).

2. MD. CODE ANN., COM. LAW I § 2-725 (1997).

3. *See Washington Freightliner*, 351 Md. at 637, 719 A.2d at 551.

4. *See also id.* at 624-25, 719 A.2d at 545; MD. CODE ANN., COM. LAW I § 2-725(2) (1997) (explaining that "[a] cause of action accrues when the breach occurs . . . [a] breach of warranty occurs when tender of delivery is made").

5. *Washington Freightliner*, 351 Md. at 637, 719 A.2d at 551. According to section 2-725(1), stating that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." MD. CODE ANN., COM. LAW I § 2-725(1).

6. *Washington Freightliner*, 351 Md. at 636-37, 719 A.2d at 551.

7. *See infra* notes 209-225 and accompanying text (discussing the precedent set forth by *Washington Freightliner*).

8. *See* MD. CODE ANN., COM. LAW I § 2-503 (official comment 1) (suggesting that whether tender of delivery has occurred may depend on whether a seller has offered goods "as if in fulfillment of the contract" which is a consideration requiring inquiry into the subjective mind of the seller); *see also infra* notes 244-252 and accompanying text (discussing this apparent flaw in the majority's reasoning).

claims.[9] Moreover, this decision sends a message to parties doing business under Maryland law that they will need to make their intention clear in the language of their agreement if they wish to postpone the running of section 2-725 until any testing of the goods is complete.

1. The Case.—Shantytown Pier, Inc. (Shantytown) is a family business engaged in providing recreational boating trips for customers in the Ocean City, Maryland area.[10] In furtherance of the company's business goals, Shantytown's president, Charles Nichols, sought to build the "largest and the fastest and the sleekest head boat in Ocean City or up and down the east coast."[11] In March 1990, Shantytown contracted with Lydia Yachts (Lydia), a Florida boatyard, to construct the vessel to be named the "Ocean City Princess" (O.C. Princess).[12] To power the O.C. Princess, Shantytown purchased three "MAN D2840LXE 820-horsepower, 10-cylinder engines from Washington Freightliner Inc. (WFI), one of the defendants."[13] These engines were manufactured by MAN Roland, Inc. (MAN), also a defendant in the case.[14] The contract for sale of the engines included a total purchase price of "$163,000, 'FOB Pompano Beach, Florida.'"[15] The

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9. In *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261 (D. Del. 1983) the court noted that

> [w]hile this limitation period may appear relatively short, it was designed by the drafters of the Uniform Commercial Code to serve the important function of providing a point of finality for businesses after which they could destroy their business records without the fear of a subsequent breach of contract for sale or breach of warranty suit arising to haunt them . . . . Hence, the finality necessary to promote the flow of commerce is effectuated by the limitation period.

Id. at 1266 (citing 3 W.D. HAWKLAND, UNIFORM COMMERCIAL CODE SERVICE § 2-725:02, at 479 (1938)); *see also infra* notes 253-265 and accompanying text (explaining the policy goals upheld by this decision).

10. *See Washington Freightliner*, 351 Md. at 618-19, 719 A.2d at 542.

11. Brief of Appellees at 3, Washington Freightliner v. Shantytown Pier, 351 Md. 616, 719 A.2d 541 (1998) (No. 38) (internal quotation marks omitted) (citation omitted).

12. *See Washington Freightliner*, 351 Md. at 619, 719 A.2d at 542.

13. *Id.*

14. *See id.*

15. *Id.* The abbreviation "FOB" represents the phrase "Free on Board" and is defined as "[a] delivery term which requires a seller to ship goods and bear the expense and risk of loss to the F.O.B. point designated." BLACK'S LAW DICTIONARY 642 (6th ed. Centennial ed. (1891-1991) 1990). In the commercial context, FOB terms are addressed by § 2-319 of the Maryland Code's Commercial Law article, which explains:

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into possession of the carrier; or

price quotation for these terms also addressed the delivery, explaining that the price excluded installation and "included start up and commissioning[16] (8 hour allowance)."[17]

By September 30, 1990, the three MAN engines had been physically delivered to Lydia's boatyard by Marine Mechanical Systems (MMS), a Florida distributor of MAN products and a third defendant in this case.[18] About six months later, on April 20, 1991, after Lydia had built the O.C. Princess and installed the MAN engines, employees of Shantytown, MMS, and Lydia commissioned the vessel without incident.[19] Despite a problem-free trial run at sea, one or more of the engines failed on numerous occasions in the years following the com-

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(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);
(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

MD. CODE ANN., COM. LAW I § 2-319 (1997).

16. "Commissioning" is a term used to describe a post-installation testing phase for marine vessels and their engines. *See Washington Freightliner*, 351 Md. at 621, 719 A.2d at 543. Commissioning in this case included "monitor[ing] operating temperatures, pressures, exhaust temperatures, engine room depression, and record[ing] the values at a variety of speeds, including wide-open throttle." *Id.*

17. *Id.* at 641-42, 719 A.2d at 553 (Eldridge, J., dissenting) (citation omitted). The relevant section of the price quotation read in full:

The afore-mentioned price is a firm price and is *for delivery*,
— FOB Pompano Beach, Florida
— Including, shipping skid, excluding boxing
— Including United States customs duty and custom charges
— *Excluding installation*
— Excluding any State or Local Tax
— *Including start up and commissioning (8 hour allowance)* . . . .

Id. (alteration in original) (citation omitted). While this explanation of the terms of the contract are quoted in Judge Eldridge's dissent, they are not contested facts of the case. *See Washington Freightliner*, 351 Md. at 622-23, 719 A.2d at 544. The court acknowledged that while

> the contract of sale is not in evidence . . . [t]he record . . . does contain a two page quotation which all parties in effect agree contains the specific terms (as contrasted with the general terms) for the sale to Shantytown. The quoted price of $163,000, F.O.B. Pompano Beach, includes "Start up and Commissioning (8 Hr. Allowance)."

Id. (footnote omitted). The contract terms that include start-up and commissioning eventually give rise to the issue addressed by the *Washington Freightliner* court. Shantytown argued that because of these contract terms, the statute of limitations did not begin running until after the commissioning occurred. *See id.* at 624, 719 A.2d at 544-45.

18. *See id.* at 619, 719 A.2d at 542.

19. *See id.*; *id.* at 621-22, 719 A.2d at 543-44 (naming the persons present during the O.C. Princess' commissioning).

missioning.[20] In hope of remedying these malfunctions,[21] Shantytown purchased yet another of the MAN engines, which eventually failed as well.[22]

On October 6, 1994, Shantytown filed suit in the Circuit Court of Worcester County against WFI, MMS, and MAN, alleging "breaches of express warranty, of contract, and of the implied warranties of merchantability and of fitness for a particular purpose."[23] Judge Theodore R. Eschenburg denied the defendants' pre-trial motions for summary judgment, which argued that Shantytown's claims were time-barred.[24] Before trial, Shantytown dismissed all of its claims against the defendants except for the implied warranty claims.[25]

At trial, Shantytown argued that the statute of limitations did not begin until April 20, 1991, when the engines were commissioned.[26] The defendants, in their motions for judgment, argued that Shantytown's claim was time barred because tender of delivery was made upon physical delivery of the three MAN engines to Lydia, Shantytown's agent.[27] The defendants twice renewed their limitations argument during the trial, first at the close of Shantytown's case, and

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20. *See id.* at 619, 719 A.2d at 542 (explaining that "[o]n ten separate occasions during the nearly four years of operating the O.C. Princess, Shantytown experienced failures of one or another of each of the three engines").

21. *See id.* at 619, 719 A.2d at 542. Primarily, the engine failures were due to "complications involving faulty pistons." *Id.*

22. *See id.*

23. *Id.* at 620, 719 A.2d at 543.

24. *See id.* (discussing how Judge Eschenburg denied the defendants' motions for summary judgment). The applicable statute of limitations in this type of case mandated that an action for breach of warranty "must be commenced within four years after the cause of action accrues." MD. CODE ANN., COM. LAW I § 2-725(1) (1997). A cause of action accrues upon breach of the warranty, which "occurs when tender of delivery is made." MD. CODE ANN., COM. LAW I § 2-725(2) (1997). In relevant part, the statute reads:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. *A breach of warranty occurs when tender of delivery is made*, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.

MD. CODE ANN., COM. LAW I § 2-725(1)(2) (1997) (emphasis added).

25. *See Washington Freightliner*, 351 Md. at 620, 719 A.2d at 543 (noting that Shantytown "voluntarily dismissed its express warranty and breach of contract claims").

26. *See id.*

27. *See Washington Freightliner*, 351 Md. at 618, 719 A.2d at 542 (explaining the two possible dates and events which might constitute "tender of delivery").

second at the close of all evidence.[28] After the jury found in favor of Shantytown on the breach of implied warranties claim, the defendants again relied on their limitations argument in motions for judgment notwithstanding the verdict.[29] In denying these motions, trial Judge Thomas C. Groton stated that Shantytown was

> not given control of the engines until they were placed in the boat and the boat was commissioned, and then when it was first commissioned, the boat wasn't even in their control. It was in the control of . . . more than Lydia . . . . It was in the control of some of [the defendants'] representatives that were part of the commissioning that in essence, were in charge of the process.[30]

In an unreported opinion, the Court of Special Appeals affirmed Judge Groton's decision as to the date of tender of delivery.[31] The Court of Special Appeals held that it was the defendants' burden to prove that the limitations period had run and that "the trial court had before it evidence from which it reasonably could have decided that the price quotation and testimony at trial constituted sufficient proof of a requirement of commissioning [and] that [defendants] had thus failed to carry their burden of persuasion."[32] Defendants appealed, and the Court of Appeals granted certiorari to decide "whether tender of delivery under section 2-725(2) occurred when the defendants delivered the engines for Shantytown to Lydia or when the O.C. Princess was commissioned."[33]

2. Legal Background.—Most of the state legislatures, including the Maryland General Assembly, have adopted sections of the Uniform Commercial Code (UCC or Code) verbatim as their commercial law statutes.[34] Such straightforward adoption of UCC provisions furthers one of the primary underlying goals of the UCC: "to make uniform the law among the various jurisdictions."[35] Two Code provisions

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28. *See Washington Freightliner*, 351 Md. at 620, 719 A.2d at 543 (describing the defendants' motions at trial and the court's rulings).

29. *See id.* at 622, 719 A.2d at 544.

30. *Id.* (internal quotation marks omitted) (quoting Record Extract at E104).

31. *See id.*

32. *Id.* at 623, 719 A.2d at 544 (internal quotation marks omitted) (citations omitted).

33. *Id.*

34. *See* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 1 (2d ed. 1980) (explaining that "[b]y 1979, the Uniform Commercial Code . . . (with minor variations), had become law in all states but Louisiana, and law in the District of Columbia and the Virgin Islands" (footnote omitted)).

35. U.C.C. § 1-102(2)(c) (1999). For the purposes of this Note, when discussing Maryland law the Maryland Code's Commercial Article will be cited, but when discussing cases

that states often adopt verbatim are U.C.C. § 2-503 (Manner of Seller's Tender of Delivery) and § 2-725 (Statute of Limitations in Contracts for Sale).[36] While these statutes are often facially identical among states, state courts may interpret them differently.[37]

a. The Relevant Code Provisions.—By examining both the provisions themselves and the various case law interpreting those provisions, it becomes more clear when and under what circumstances a seller of goods triggers the statute of limitations for implied warranty claims.

(1) Section 2-725: Statute of Limitations in Contracts for Sale.[38]—Section 2-725's language limits the time a buyer has to sue a seller for breach of contract or warranties before being time-barred. It reads, in relevant part:

> (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. *A breach of warranty occurs when tender of delivery is made,* except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.[39]

In applying the statute, a court need only compare the date of tender of delivery to the date on which the aggrieved party filed suit.[40] Complications arise, however, because section 2-725 and its official

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from other states and federal law, the U.C.C. will be cited. As is stated in the above text, Maryland has adopted the U.C.C.

36. *Compare* U.C.C. §§ 2-503, 2-725, *with* CONN. GEN. STAT. §§ 42a-2-503, 42a-2-725 (1999); DEL. CODE ANN. tit. 6, §§ 2-503, 2-725 (1998); KAN. STAT. ANN. §§ 84-2-503, 84-2-725 (1998); MD. CODE ANN., COM. LAW I §§ 2-503, 2-725; MINN. STAT. ANN. §§ 336.2-503, 336.2-725 (West 1998); N.Y. U.C.C. §§ 2-503, 2-725 (McKinney 1998); OHIO REV. CODE ANN. §§ 1302.47, 1302.98 (West 1999), *and* S.D. CODIFIED LAWS §§ 57A-2-503, 57A-2-725 (1999) (adopting U.C.C. §§ 2-503 and 2-725).

37. *See* WHITE & SUMMERS, *supra* note 34, at 8 ("Today, many Code sections have been the subject of judicial interpretation and construction in more than one jurisdiction and the courts disagree over the meaning of many sections.").

38. MD. CODE ANN., COM. LAW I § 2-725 (1997).

39. *Id.* § 2-725(1), (2) (emphasis added).

40. *See id.* (laying out a formula for determining whether a claim is time-barred).

comment are silent on what tender of delivery means.[41] Instead, section 2-503 and its official comment, which deal directly with tender of delivery, are more instructive.[42]

(2) Section 2-503: Manner of Seller's Tender of Delivery.—Section 2-503 governs how and when a seller must deliver the goods to a buyer in a contract for sale.[43] In addition, the section defines tender of delivery as follows: "(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery."[44]

While the text of this section offers only one explanation of "tender of delivery," the official comment makes it clear that "'tender' is used in [the Code] in two different senses."[45] The comment explains:

> In one sense it refers to 'due tender' which contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed. . . . At other times it is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation.[46]

The comment concludes that "[u]sed in either sense, however, "tender" connotes such performance by the tendering party as puts the other party in default if he fails to proceed in some manner."[47]

b. Judicial Interpretation of the Code.—

(1) The Controlling Sense of "Tender of Delivery".—The two senses of tender of delivery described in section 2-503's official com-

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41. *See id.* (official comment 1) (lacking instruction on defining "tender of delivery" for the purposes of the statute of limitations).

42. *See* MD. CODE ANN., COM. LAW I § 2-503 and official comment 1 (discussing "tender of delivery" for the purposes of the U.C.C.).

43. *See id.* (official comment 1) ("The major general rules governing the manner of proper or due tender of delivery are gathered in this section."). For example, § 2-503(1)(a) notes that "tender of delivery must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession." *Id.* § 2-503(1)(a). Section 2-503 also deals with requirements pertaining to the delivery of documents, § 2-503(3)(4)(5), and delivery "where goods are in the possession of a bailee and are to be delivered without being moved." *Id.* § 2-503(4).

44. MD. CODE ANN., COM. LAW I § 2-503(1).

45. U.C.C. § 2-503 (official comment 1).

46. *Id.*

47. *Id.*

ment beg the question: which sense controls in limitations context?[48] Case law offers some answers.[49] Courts have routinely applied the less demanding sense of delivery, which requires only "an offer of goods or documents under a contract *as if in fulfillment* of its conditions even though there is a defect when measured against a contract obligation."[50] In this sense, the limitations period in section 2-725 begins to run regardless of whether the seller delivers defective goods, so long as the seller delivers "as if in fulfillment of" the contract's conditions.[51]

Use of a less restrictive tender of delivery can be explained on policy grounds. The purpose of the Code's statute of limitations is to limit the period of vulnerability for sellers to claims by aggrieved buyers and to limit the time in which sellers must maintain records of sale.[52] The framers of the Code chose a four year period as the statute of limitations, in keeping with normal commercial standards.[53] The purpose of this time limit "is to provide a finite period in time when the seller knows that he is relieved from liability for a possible breach of contract for sale or breach of warranty."[54]

(2) Physical Delivery of Goods.—The clearest decisions concerning the application of section 2-725 arise when the seller's only obligation to the buyer is the physical delivery of goods. The delivery

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48. *See id.* (explaining that "tender of delivery" under the Code "is used . . . in two different senses.").

49. *See, e.g.*, Navistar Int'l Corp. v. Hagie Mfg. Co., 662 F. Supp. 1207, 1210 (N.D. Ill. 1987) (applying the definition of delivery that requires only that the seller offer goods as if in fulfillment of the agreement even though defects might exist); Nelligan v. Tom Chaney Motors, Inc., 479 N.E.2d 439, 442 (Ill. App. 1985) (same); Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261, 1267 (D. Del. 1983) (same).

50. U.C.C. § 2-503 (1999) (official comment 1) (emphasis added); *see, e.g., Navistar*, 662 F. Supp. at 1210 (rejecting the argument that the statute of limitations period embodied in U.C.C. § 2-725 begins to run only after the seller delivers conforming, nondefective goods); *Ontario Hydro*, 569 F. Supp. at 1267 (same); *Nelligan*, 479 N.E.2d at 442 (same); *see also* W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-725:2 (1994 ed. 1994) ("It should be noted that UCC section 2-725(2) refers to 'tender of delivery' and not 'conforming tender of delivery.' Tender of nonconforming goods, therefore, will trigger the statute of limitations in warranty cases not involving explicit agreements to extend to future performance.").

51. U.C.C. § 2-503 (1999) (official comment 1).

52. *See Ontario Hydro*, 569 F. Supp. at 1266 (explaining that section 2-725 "was designed by the drafters of the Uniform Commercial Code to serve the important function of providing a point of finality for businesses after which they could destroy their business records without the fear of a subsequent breach of contract for sale or breach of warranty suit arising to haunt them.").

53. *See* U.C.C. § 2-725 (official comment 1) (noting that the four-year time limit "is within the normal commercial record keeping period").

54. *Ontario Hydro*, 569 F. Supp. at 1267.

requirement in such cases is satisfied when the buyer takes possession of the goods after the transaction is complete.[55] In such a case, at the time of sale, the seller has completed all contractual obligations and has relinquished control to the buyer. The limitations period begins at this point, and section 2-725 will bar any warranty claim brought by a buyer if it is not made within four years of the taking of the goods.[56] These types of cases that involve a purchase of ready to use goods provide for a mechanical application of section 2-725, because absent an agreement to the contrary, the seller is no longer obligated to the buyer, and the seller does not have any continuing control over the goods.[57]

(3) "Tender of Delivery" When the Seller Is Obligated to Assemble or Install Goods.—A slightly more complicated transaction arises when a contract requires the seller not only to provide goods, but to assemble or to install them for the buyer.[58] In these cases, the courts have developed the general rule that where a contract expressly obligates the seller to install the goods purchased, tender of delivery occurs, for limitations purposes, when installation is complete.[59]

In *Val Decker Packing Co. v. Corn Products Sales Co.*,[60] the United States Court of Appeals for the Sixth Circuit considered a contract dispute between a buyer of corn syrup storage facilities and a seller whose obligations included the sale *and* installation of the materials.[61] The buyer filed a suit for breach of implied warranties less than four years after the seller had completed the installation of certain heating

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55. *See* Mills v. International Harvester Co., 554 F. Supp. 611, 612-13 (D. Md. 1982) (treating as the delivery date for section 2-725 purposes the date upon which buyer took possession of a tractor from seller).

56. *See id.* at 613 (barring a breach of warranty claim against a seller of a tractor on limitations grounds because the buyer commenced action twelve years after simple purchase and taking possession of the goods).

57. Such a situation provides for a mechanical application of section 2-725 because the date of delivery is not in dispute. Absent any argument to the contrary, in determining the date of delivery a court would have no other possible delivery date except for the one upon which possession changed hands. *See id.* at 612 (explaining that "[section] 2-725 means just what it says: a warranty action must be brought within four years of the tender of the goods forming the basis of the warranty"); *id.* at 613 (finding that tender of delivery occurred upon the initial exchange of the goods in 1970 and that "[section] 2-725 bars a warranty action brought in 1982 when plaintiffs make no allegation that the warranty expressly extended the statutory period"). Thus, simply counting four years from that date provides for a mechanical application of section 2-725.

58. *See infra* notes 60-74 and accompanying text (discussing cases dealing with such contracts).

59. *See infra* notes 60-74 and accompanying text (discussing cases supporting this rule).

60. 411 F.2d 850 (6th Cir. 1969).

61. *Id.* at 851.

equipment.[62] The court decided that OHIO REVISED CODE ANNOTATED § 1302.98[63] controlled and that the buyer's claim was timely because the period of limitations began to run when the seller had completed the installation.[64]

In *Standard Alliance Industries, Inc. v. Black Clawson Co.*,[65] the Sixth Circuit again regarded the seller's completion of the installation as the proper trigger for Ohio's statute of limitations.[66] In this case, the parties contracted for the sale and installation of a 175-ton "horizontal automatic radial forging facility,"[67] but agreed to reduce the limitations period to one year.[68] The court held that the buyer's warranty claims were time-barred by section 2-725 because they were filed over one year after the seller had completed the required installation of the machine.[69]

Federal courts interpreting Maryland law have made analogous determinations concerning delivery and the seller's obligations to install goods. In *In re Automated Bookbinding Services*,[70] the Federal District Court for the District of Maryland considered an appeal from the order of a bankruptcy referee that turned on the issue of when a bankrupt buyer received possession of a bookbinding machine.[71] If the buyer obtained possession when the machine's parts arrived unas-

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62. *See id.* (noting that "the complaint was filed on January 10, 1967," and that "installation was completed on or about June 20, 1963").

63. OHIO REV. CODE ANN. § 1302.98 (West 1999). This section of Ohio's code is identical to U.C.C. § 2-725 and its Maryland counterpart. *Compare* OHIO REV. CODE ANN. § 1302.98 (West 1999), *with* U.C.C. § 2-725 (1999), *and* MD. CODE ANN., COM. LAW § 2-725 (1997).

64. *See Val Decker*, 411 F.2d at 853-54 (remanding the dispute for further consideration as it was not barred by the four year statute of limitations).

65. 587 F.2d 813 (6th Cir. 1978).

66. *See Standard Alliance*, 587 F.2d at 819 ("Under section 2-725, a cause of action accrues upon initial installation of the product regardless of whether it functions properly or not so long as the warranty does not extend to future performance." (citing *Val Decker*, 411 F.2d 850 (6th Cir. 1969)).

67. *Id.*

68. *See id.* at 818 (noting that the contract "contained a one-year limitations period"). The U.C.C. expressly allows parties to reduce limitations periods to a minimum of one year. *See* U.C.C. § 2-725(1) ("By the original agreement the parties may reduce the period of limitations to not less than one year but may not extend it.").

69. *See Standard Alliance*, 587 F.2d at 821 (finding that the buyer's warranty claims were barred by section 2-725 because "suit was not brought until over a year [after installation]").

70. 336 F. Supp. 1128 (D. Md. 1972), *rev'd*, 471 F.2d 546 (4th Cir. 1972); *see infra* note 74 (discussing the reversal of this case).

71. *See Automated*, 336 F. Supp. at 1133 (explaining that the issue is which of the bankrupt's creditors have priority and that "'[p]ossession' [is] the key word" of the applicable bankruptcy statute).

sembled, then one of buyer's creditors had priority in the dispute.[72] If, however, the buyer obtained possession when the seller installed the machine and trained the company's employees, then the seller of the machine had priority because it had perfected its purchase money security interest in the machine within ten days of the buyer taking possession.[73] The court equated tender of delivery of the seller under section 2-503 of the Maryland Code's Commercial Law Article with the taking of possession of the assembled machine by the buyer and found that the seller's purchase money security interest had priority.[74] The court reasoned that because the seller was obliged under the contract to install the machine and to train the buyer's employees in its operation, the buyer gained possession only when the seller had completed tender of delivery, that is, when it had completed the installation and training.[75]

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72. *See id.* at 1133-35 (discussing the claims of the bankrupt company's creditors and the governing statute); *see also* MD. CODE ANN., COM. LAW I § 9-312(4) (1997) ("A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within 20 days thereafter.").

73. *See Automated*, 336 F. Supp. at 1133-35 (invoking section 9-312(4) and explaining that the date upon which the buyer gained "possession" of the machine would determine which creditor would have priority); MD. CODE ANN., COM. LAW I § 9-312(4) (1997).

74. *See Automated*, 336 F. Supp. at 1135. The court stated:

> [T]his court holds that tender of delivery and acceptance of what the parties had bargained for in their purchase and security agreement occurred no earlier than June 13, 1970 [when seller completed installation] and that possession of the new binder within the meaning of the U.C.C. vested in Bankrupt [buyer] no earlier than that date.

Id. Although this holding was reversed by the U.S. Court of Appeals, *Automated*, 471 F.2d 546 (4th Cir. 1972), its relevance to "tender of delivery" remains. The Fourth Circuit reversed the case not because of the district court's interpretation that "tender of delivery" included installation, but because that court chose to equate "possession" as used in the Maryland Code's Commercial Law Article 9 (Secured Transactions) with the principles of delivery from the Maryland Code's Commercial Law Article 2 (Sales). *See Automated*, 471 F.2d at 553 (explaining that possession under section 9-312(4) is not dependent upon completion of tender of delivery terms "which affect only the buyer and seller of goods"). The Fourth Circuit explained that "[t]ender of delivery is a *sales* concept, employed by Article 2, which binds a buyer and a seller to contractual conditions. It affects their rights against each other. It would be a serious error to allow those private conditions to affect the carefully defined rights of *creditors* under Article 9." *Automated*, 471 F.2d at 553 (footnote omitted) (emphasis added).

75. *See Automated*, 336 F. Supp. at 1134 (explaining that "tender of delivery is an essential step in transactions falling under the U.C.C. §§ 2-503 and 2-507," and that "[u]nder these facts . . . [seller] was in no position to tender delivery under its agreement until the equipment had been assembled, placed in first class running order, and an employee of [the buyer] had been trained as an operator"); *see also* MD. CODE ANN., COM. LAW I §§ 2-503, 2-507 (1997) (codifying U.C.C. §§ 2-503, 2-507).

(4) "Tender of Delivery" and Contractual Requirements of Pre-Delivery Testing.—The issue of when tender of delivery occurs for statute of limitations purposes also arises in contracts that require testing of goods before they are placed at the buyer's disposition. In most cases, such testing requirements in a contract will not affect the general rule that "tender of delivery" occurs upon the date of physical delivery.[76] If contract terms are explicit and if they expressly contemplate testing and delivery, however, the triggering of the limitations period might be postponed until testing is complete.[77]

City of New York v. Pullman[78] exemplifies this exception. In *Pullman*, a seller of subway cars contracted with the New York City Transit Authority (NYCTA) to sell 754 "R-46" subway cars.[79] Because the design of these cars was "radically different" from those normally used by the City,[80] the contract specifically required that the seller deliver ten cars for preliminary inspection and testing so that the NYCTA could determine whether this new design met the contract specifications.[81] If these cars did not meet the specifications, the NYCTA could decide against receipt of the remaining cars.[82] The seller physically delivered these ten cars in March 1975, and they passed inspection and testing in December 1975.[83] The seller delivered the remaining 744 cars in December 1978.[84] In July 1979, after several of the cars had experienced technical failures, the NYCTA and the City of New York sued the seller for breach of implied warranties.[85] After a trial in the United States District Court for the Southern District of New York, the jury rendered judgment and damages for the plaintiffs.[86]

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76. *See infra* notes 119-140 and accompanying text (discussing cases which exemplify the general rule that physical delivery triggers the limitations period in section 2-725).

77. *See infra* notes 119-140 and accompanying text (discussing cases so holding).

78. 662 F.2d 910 (2d Cir. 1981).

79. *Pullman*, 662 F.2d at 912.

80. *See id.* at 912-13.

81. *See id.* at 919 (explaining that "[s]pecification 3.5 of the Equipment Contact" required "[t]he delivery of ten subway cars for final on-line tests and inspection").

82. *See id.* ("[U]nder the contract appellees were not obliged to take any steps until appellants conformed to the specifications by delivering cases which had completed the 30 day test . . . .").

83. *See id.* at 912, 919.

84. *See id.* at 912 ("Following the completion of the online tests, deliveries continued until December 1978.").

85. *See id.* at 913 (discussing the malfunctions of the goods and citing the date of initial filing for breach of warranty).

86. *See id.* at 912.

On appeal, the Second Circuit affirmed, explaining that the NYCTA's claim was not time-barred under N.Y.U.C.C. § 2-725[87] because tender of delivery occurred and the statute of limitations began to run at the earliest in December 1975.[88] The court explained that the contract explicitly obligated the seller to deliver goods that conformed to the testing standards required of the initial ten cars.[89] Accordingly, the court reasoned that tender of delivery could not have occurred until the preliminary testing was completed—December 1975.[90] The court explained that, "under the contract [the NYCTA was] not obligated to take any steps until [the seller] conformed to the specifications by delivering cars which had completed the 30 day test, since the contract specifically provided that any cars built before the 30 day test were constructed at the seller's risk."[91] Thus, *Pullman* stands for the proposition that if the contract contains specific language, parties may contract to postpone tender of delivery until after testing has been completed.

The Second Circuit affirmed the validity of *Pullman* in *H. Sand & Co., Inc. v. Airtemp Corp.*,[92] but indicated that agreements to postpone delivery must be explicit.[93] *Airtemp* deals with a breach of warranty in a contract for the sale of four motorized chillers.[94] All four of the chillers were sent to the buyer, but one of them had not yet been tested.[95] This chiller was returned to the seller for testing and then

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87. N.Y. U.C.C. § 2-725 (McKinney 1998). Note that this statute is identical to U.C.C. § 2-725 and its Maryland counterpart. *Compare* N.Y. U.C.C. § 2-725 (McKinney 1998), *with* U.C.C. § 2-725 (1999), *and* MD. CODE ANN., COM. LAW I § 2-725 (1997).

88. *See Pullman*, 662 F.2d at 919 (explaining that the "tender of delivery could not occur, and did not occur, until the required test of the sample train was completed in December 1975," and holding that "no aspect of appellees' cause of action was time barred").

89. *See id.* (noting the seller's obligations under the contract).

90. *See id.* (explaining the "tender of delivery could not occur").

91. *Id.*

92. 934 F.2d 450 (2d Cir. 1991); *see id.* at 455 (citing *Pullman*, 662 F.2d at 919, and explaining that "parties may by contract agree that delivery will not be made until some form of testing has been completed").

93. *See id.* at 455 (explaining that without contract provisions to the contrary, "where a contract simply provides for delivery to be followed by testing, the pretesting delivery constitutes 'tender of delivery' within the meaning of N.Y. U.C.C. § 2-725(2) (McKinney 1964)" (citing City of Cincinnati v. Dorr-Oliver, Inc., 659 F. Supp. 259, 262 (D. Conn. 1986) and Raymond-Dravo-Langenfelder v. Microdot, Inc., 425 F. Supp. 614 (D. Del. 1977))).

94. *Airtemp*, 934 F. Supp. at 452. More specifically, these chillers were "motor driven hermetic centrifugal chillers, which constituted a cooling system." *Id.*

95. *See id.* The court explained that the fourth chiller had not been tested, "because by the time it was ready to be tested [the seller] was in the process of relocating its testing facilities from Kentucky to Edison, New Jersey." *Id.*

sent back to the buyer.[96] The issue before the Second Circuit was whether material issues of fact existed as to when tender of delivery occurred: when the four chillers were first delivered or when the seller tested and returned the final chiller.[97] The court decided that such issues of fact existed, explaining that a reasonable jury could find that after initial delivery, the fourth chiller was not at the buyer's disposition, but rather, was being held by the buyer so that the seller could fulfill its testing obligations at a later date.[98] In so deciding, the court affirmed *Pullman*, noting that "parties may by contract agree that delivery will not be made until some form of testing has been completed."[99] Moreover, the court acknowledged that when parties wish to postpone delivery until after testing, the terms of the contract must specifically express such intent.[100]

The ability of parties to include pre-delivery testing obligations in contracts for sale has also been confirmed in the federal district courts. In *St. Anne-Nackawic Pulp v. Research-Cottrell*,[101] the United States District Court for the Southern District of New York refused to allow the New York statute of limitations period[102] to begin before the seller and installer of a pollution control system had completed the clear testing obligations outlined in the contract.[103] The court reasoned that under a running obligation to test the system the seller could not have placed the system at the buyer's disposition.[104] Because there was evidence that the parties intended the seller's testing obligations to extend well beyond mere physical delivery and installa-

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96. *See id.* (explaining the movement of the fourth chiller).

97. *See id.* at 453-54. The court stated:

> There is no question that the resolution of the date of tender of delivery is material, for [buyer]'s ability to bring its claim turns on the resolution of this issue of fact. The only question, therefore, is whether the issue of fact is genuine, that is, whether there is sufficient evidence to allow a jury to find that tender of delivery occurred within four years of the time Sand filed suit.

Id. (citing U.C.C. § 2-725(1)).

98. *See id.* at 454 (finding that a reasonable jury could conclude that the buyer's agent was holding the chiller for the seller's convenience and was at the seller's disposition, not at the buyer's).

99. *Id.* at 455 (citing City of New York v. Pullman, Inc., 662 F.2d 910, 919 (2d Cir. 1981)).

100. *Id.*

101. 788 F. Supp. 729 (S.D.N.Y. 1992).

102. *See* N.Y. U.C.C. § 2-725 (McKinney 1998). Note that this statute is identical to U.C.C. § 2-725 and its Maryland counterpart. *Compare* N.Y. U.C.C. § 2-725 (McKinney 1998), *with* U.C.C. § 2-725 (1999), *and* MD. CODE ANN., COM. LAW I § 2-725 (1997).

103. *See St. Anne*, 788 F. Supp. at 736 (explaining that while testing occurred, seller was still performing under the contract).

104. *See id.* (noting that the "plaintiff could not have sued for breach of contract while [the seller] was still performing under the [c]ontract").

tion,[105] the court reasoned that the seller could not have breached and the buyer could not have sued, until testing was complete.[106] The court found, "it would be irrational to conclude that the statute of limitations began to run while [the seller] was still performing."[107]

While there are no cases directly on point, cases such as *William F. Wilke, Inc. v. Cummins Diesel*[108] show that Maryland courts have taken similar steps when dealing with contracts that require testing to be conducted by the seller.[109] In such cases, parties may postpone tender of delivery until completion of testing by including detailed terms in the contract that require the seller to deliver and test the goods to ensure conformity to the contract's specifications.[110] In *Wilke*, the Court of Appeals decided that a seller's physical delivery of an emergency diesel generator to a buyer's jobsite "did not amount to delivery of goods or the performance of obligations conforming to the [sales] contract."[111] The explicit terms of the contract required that the generator be "in strict compliance with plans and specifications . . . complete in all respects, including all required tests for the sum of Thirteen Thousand Three Hundred Dollars ($13,300). . . This price includes all requirements set forth in paragraph 39.22 . . . ."[112] The court interpreted this clause to mean that the parties intended that only goods conforming to the several specifications would satisfy the seller's performance obligations.[113] The contract itself, in conjunction with statements by the seller that were inconsistent with the

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105. *See id.* (acknowledging that "neither party expected the system to work upon mechanical completion").

106. *See id.* (explaining that the "defendant could not have breached the [c]ontract while it was still performing . . . [,]" and that the "plaintiff could not have sued for breach while [the seller] was still performing under the [c]ontract").

107. *Id.*

108. 252 Md. 611, 250 A.2d 886 (1969).

109. *See infra* notes 111-115 and accompanying text (discussing relevant Maryland precedent).

110. *See supra* notes 108-109; *infra* notes 111-115 and accompanying text (discussing the facts and holding of *Wilke*).

111. *Wilke*, 252 Md. at 618, 250 A.2d at 890 (internal quotation marks omitted) (citation omitted).

112. *Id.* at 613, 250 A.2d at 887 (emphasis omitted) (footnotes omitted). Paragraph 39.22 contained the government specifications required of the generator. *See id.* The court gave special attention to the length and detail of the specifications and remarked that "[i]t will be recalled that Wilke's purchase order specifically incorporated the government specifications, which consisted of two and a half pages of single-spaced typescript which detailed the field tests to be performed prior to acceptance by the government." *Id.* at 617, 250 A.2d at 890.

113. *See id.* (discussing the obligations of the parties and commenting that "these tests were not intended to be an empty ritual").

buyer's control of the goods,[114] led the court to conclude that physical delivery of the untested goods, "could not constitute . . . [delivery of goods conforming to the contract] until the generator had been installed, started up, and field tests completed . . . to the satisfaction of the government."[115]

(5) Post-Delivery Testing and the Need for Explicit Terms to Postpone Limitations.—Cases holding that completion of testing constitutes "tender of delivery," however, have become the exception and not the general rule.[116] In most contracts that permit the buyer to test or to inspect after physical delivery or installation, the date of the seller's last substantial contact with the goods represents tender of delivery and constitutes the breach necessary to trigger the limitations period in warranty actions.[117] The rule that has developed is that tender of delivery will be postponed until after testing only when the contract terms clearly contemplate pre-tender of delivery testing. Parties must phrase their agreements in detailed terms that reflect their express intent to obligate the seller beyond mere physical delivery. If the contract does not expressly reflect such intent, the seller's last contact with the goods, whether that be physical delivery or installation, will mark tender of delivery and trigger section 2-725.[118]

The cases that most clearly communicate this rule devote most of their time distinguishing the holding of *Pullman* as applicable only to the unique factual situation that arises when a contract contemplates pre-delivery testing.[119] In *Ontario Hydro v. Zallea Systems, Inc.*,[120] the United States District Court for the District of Delaware applied Delaware's four-year statute of limitations in a breach of warranty action by

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114. When asked why the generator was delivered without the batteries necessary for start-up, an employee of the seller explained that "he did not want . . . [the buyer] to start it or fool with it," and stated that "[t]his is my baby until I start it and turn it over to you." *Id.* at 613, 250 A.2d at 888 (internal quotation marks omitted).

115. *Id.* at 618, 250 A.2d at 890.

116. *See City of Cincinnati v. Dorr-Oliver*, 659 F. Supp. 259, 262 (D. Conn. 1986) (explaining that typically "'tender of delivery' as contemplated by section 42a-2-725 [(Connecticut's verbatim adoption of U.C.C. § 2-725)] is not contingent upon inspection, testing, or acceptance").

117. *See, e.g., id.* (finding that the limitations period began upon seller's final installation, despite contractual testing obligations); Boains v. Lasar Mfg. Co., 330 F. Supp. 1134, 1135 (D. Conn. 1971) (same).

118. *See* U.C.C. § 2-725 (1999); MD. CODE ANN., COM. LAW I § 2-725 (1997) (explaining that tender of delivery will trigger a four-year limitations period for breach of warranty claims).

119. *See, e.g.*, City of Cincinnati v. Dorr-Oliver, Inc., 569 F. Supp. 259, 263-64 (D. Conn. 1986) (distinguishing *Pullman*); Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261, 1267-68 (D. Del. 1983) (same).

120. 569 F. Supp. 1261 (D. Del. 1983).

a buyer of expansion joints for use in the construction of a nuclear power complex.[121] The contract for sale contained a clause that "provide[d] for the inspection of goods prior to acceptance."[122] After the installed joints malfunctioned and the buyer brought suit, the seller argued that any breach of warranty claims were time-barred because tender of delivery occurred when the goods were physically delivered.[123] The buyer, relying on *Pullman*, argued that the presence of the inspection clause prevented the running of the limitations period until the inspection occurred.[124] The court, however, rejected this argument and distinguished between inspection clauses like the one in *Pullman*, which call for testing before tender of delivery, and the clause in the present contract, which "focus[ed] not on delivery but on the preservation of [the buyer's] right to reject after full delivery."[125] The court further distinguished *Pullman* on factual grounds, pointing to the level of detail in the *Pullman* inspection clause[126] and the lack thereof in the present contract.[127] The court concluded that delaying the accrual of the statute of limitations until post-delivery inspection would undermine the purposes of section 2-725.[128]

City of Cincinnati v. Dorr-Oliver, Inc.,[129] also distinguished *Pullman* from the common section 2-725 limitations case.[130] In this case, the United States District Court for the District of Connecticut considered a contract dispute between a seller of sixteen centrifuges to a water treatment plant and a buyer who brought the action for breach of warranty more than four years after installation of the devices.[131] The

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121. *See id.* at 1263-64; *see also* DEL. CODE ANN. tit. 6, § 2-725 (1998). Note that this section of the Delaware code is identical to U.C.C. § 2-725 and its Maryland counterpart. *Compare* DEL. CODE ANN. tit. 6, § 2-725 (1998), *with* U.C.C. § 2-725 (1999), *and* MD. CODE ANN., COM. LAW I § 2-725 (1997).

122. *Ontario Hydro*, 569 F. Supp. at 1267.

123. *See id.* at 1264 (discussing the seller's limitations argument).

124. *See id.* at 1267 (explaining buyer's defense to the seller's limitations argument).

125. *Id.* at 1268. The *Ontario Hydro* court also opined that *Pullman* "should not be applied liberally to all breach of warranty cases." *Id.* at 1267.

126. *See id.* at 1267-68 (quoting *Pullman*'s description of the contract terms regarding inspection and testing); City of New York v. Pullman, 662 F.2d 910, 919 (2d Cir. 1981) (explaining the terms of the contact).

127. *See Ontario Hydro*, 569 F. Supp. at 1268 (noting that unlike the contract in *Pullman*, "[i]n the present case, there was no finite period for inspection").

128. *See id.* at 1267 (explaining that to postpone the limitations period until the seller delivered conforming goods "would circumvent the very purpose of § 2-725, which, as discussed above, is to provide a finite period in time when the seller knows that he is relieved from liability for a possible breach of contract for sale or breach of warranty").

129. 659 F. Supp. 259 (D. Conn. 1986).

130. *See id.* at 263-64 (distinguishing *Pullman* by its unique factual circumstances and because the inspection in *Pullman* was post-delivery).

131. *Id.* at 260-61.

contract specifically provided for three levels of testing, one of which occurred after assembly and installation of the centrifuges.[132] After countless problems during the testing process, the buyer waived the remaining tests of the materials and ultimately brought action against the seller when the devices failed.[133] The seller relied upon section 42a-2-725,[134] arguing that the buyer's claim was time-barred.[135] Relying on *Pullman*, the buyer argued that until all of the testing had been completed and the goods accepted, tender of delivery could not have occurred, and therefore, the limitations period could not begin.[136] The court rejected this argument and explained that "'tender of delivery' as contemplated by § 42a-2-725 is not contingent upon inspection, testing, or acceptance."[137] The court also dismissed the argument that the inspection clauses in the contract contemplated pre-delivery inspection as was the case in *Pullman*.[138] The court reasoned that by the explicit language of the contract, the clauses dealt with the buyer's acceptance, not with the seller's delivery duties.[139] Moreover, "any factual similarity between *Pullman* and the case at bar ended when the plaintiff waived the very contract provision [one of the testing and inspection clauses] that would most align this case to *Pullman*."[140]

3. The Court's Reasoning.—In *Washington Freightliner, Inc. v. Shantytown Pier, Inc.*,[141] the Court of Appeals reversed the Court of

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132. *See id.* at 260.

133. *See id.* at 261.

134. CONN. GEN. STAT. ANN. § 42a-2-725 (West 1999). Note that this section of the Connecticut code is identical to U.C.C. § 2-725 and its Maryland counterpart. *Compare* CONN. GEN. STAT. ANN. § 42a-2-725 (West 1999), *with* U.C.C. § 2-725 (1999), *and* MD. CODE ANN., COM. LAW I § 2-725 (1997).

135. *See Dorr-Oliver*, 659 F. Supp. at 262.

136. *See id.* The buyer argued that the date of physical delivery did not control. *See id.* The court explained, "[r]ather, the argument runs, it is the date of acceptance that controls for determining whether the statute of limitations has run. On this score, the plaintiff contends, the suit was instituted in a timely manner because the equipment was not accepted, following extensive contract-mandated testing, until November 5, 1981." *Id.*

137. *Id.* The court added, "[w]hether or not the buyer at that time 'accepts' the goods, as that term is used in the Code, or, on the other hand, withholds acceptance until he or she has had an opportunity to fully inspect for defects, does not affect when the buyer must institute suit for breach of warranty." *Id.* (internal quotation marks omitted) (quoting Raymond-Dravo-Langenfelder v. Microdot, Inc., 425 F. Supp 614, 617 (D. Del. 1977) (citing WHITE & SUMMERS, UNIFORM COMMERCIAL CODE ("UCC") § 11-18, at 341).

138. *See id.* at 264.

139. *See id.* (explaining that the contract required installation of the equipment rather than testing before delivery); *see also id.* at 260 (describing the terms of the contract that discuss terms of acceptance, but not "tender of delivery").

140. *Id.* at 264.

141. 351 Md. 616, 719 A.2d 541 (1998).

Special Appeals, refusing to find that tender of delivery of the initial engines occurred when the O.C. Princess was commissioned.[142] Judge Rodowsky, writing for the majority,[143] found that while the agreed price for the engines included start up and commissioning, the terms of the agreement and the facts surrounding the case did not protect Shantytown from the general rule that the statute of limitations begins to run upon physical delivery of goods.[144] The court explained that "[c]ontrary to the analysis of the Court of Special Appeals, the defendants had no burden of persuading the trial court factually that accrual of the claim was not postponed until commissioning."[145]

The majority began its analysis by distinguishing what it labels the "broad" and "narrow" meanings of "tender of delivery" as explained by section 2-503 of Maryland's commercial law article and its official comment.[146] The court stated that the "broad" sense is applicable in the present case, meaning that, unless otherwise specified by the parties, tender of delivery is satisfied by "an offer of goods or documents under a contract as if in fulfillment of its conditions, even though there is a defect when measured against the contract obligation."[147] The majority explained that the broad definition of tender of delivery is required by the purpose of section 2-725.[148] The court stated that the Maryland cases which analyze "§ 2-725 unambiguously declared that the purpose of the statute is to protect defendants from stale claims."[149]

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142. *Id.* at 637, 719 A.2d at 551 (holding that Shantytown's claim was time-barred because the limitations period began when the seller physically delivered the engines).

143. *See id.* at 618, 719 A.2d at 541. Chief Judge Bell and Judges Chasanow and Karwacki joined in the majority opinion. *See id.*

144. *See id.* at 637, 719 A.2d at 551 (explaining that "[f]or the purposes of limitations on implied warranties, the ordinary rule is that the four years begins to run when the goods are delivered, and the evidence in the case before us does not alter that result").

145. *Id.* at 624, 719 A.2d at 545.

146. *Id.* at 624-26, 719 A.2d 545-46. The court described the following as a "narrow" delivery "an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and . . . followed by actual performance if the other party shows himself ready to proceed." *Id.* (quoting MD. CODE ANN., COM. LAW I § 2-503 (1997) (official comment 1)) (internal quotation marks omitted); *see also Washington Freightliner*, 351 Md. at 624-26, 719 A.2d at 545-46 (discussing the "narrow" sense of delivery).

147. *See Washington Freightliner*, 351 Md. at 625-27, 719 A.2d at 545-46 (quoting MD. CODE ANN., COM. LAW I § 2-503 (official comment 1)).

148. *See id.* at 629-30, 719 A.2d at 547 (alteration in original) (internal quotation marks omitted).

149. *See id.* at 627, 719 A.2d at 547 (citing Mills v. International Harvester Co., 554 F. Supp. 611, 612-13 (D. Md. 1982); Mattos, Inc. v. Hash, 279 Md. 371, 377, 368 A.2d 993, 996 (1977); Frericks v. General Motors Corp., 278 Md. 304, 309-16, 363 A.2d 460, 462-66 (1976)).

The court then distinguished the cases upon which Shantytown relied.[150] Employing *William F. Wilke, Inc., v. Cummins Diesel Engines, Inc.*,[151] Shantytown argued that tender of delivery for limitations purposes does not occur until all of the seller's delivery obligations are complete.[152] The court acknowledged that *Wilke* used a narrow reading of tender of delivery, but distinguished the case on a factual basis.[153] The court explained that *Wilke* dealt with section 2-510 of the Code which explains when risk of loss passes from a seller to a buyer,[154] not section 2-503 or 2-725, which are the sections of the Code relevant to the present case.[155] Therefore, the court noted, a case applying the "narrow" definition of tender of delivery to determine when risk of loss passes is not authority to apply the "narrow" definition to determine when a limitations period begins.[156]

Shantytown also relied upon *In re Automated Bookbinding Services, Inc.*,[157] similarly arguing that delivery does not occur until the seller's performance is complete.[158] The court explained that in *Automated*, where a seller was required to assemble a machine which arrived in seventeen different boxes, the seller had not tendered goods "as if in fulfillment" of the contract when it merely delivered those component parts.[159] Having simply stated the facts of *Automated*, however, the court did nothing more to distinguish them from the facts of the case at bar.

The majority viewed Shantytown's other arguments as an attempt to escape the general rule that physical delivery of goods satisfies tender of delivery in the broad sense of section 2-503.[160] Specifically,

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150. *See Washington Freightliner*, 351 Md. at 627-30, 719 A.2d at 546-48.

151. 252 Md. 611, 250 A.2d 866 (1969).

152. *See Washington Freightliner*, 351 Md. at 627, 719 A.2d at 546 (explaining Shantytown's argument that "'tender of delivery,' in the limitations context, does not occur until 'all [of] the seller's obligations with respect to physical delivery [have] been fulfilled'" (alteration in original) (quoting Brief and Appendix of Appellee at 19, Washington Freightliner v. Shantytown Pier, 351 Md. 616, 719 A.2d 541 (1998) (No. 38))).

153. *See id.* at 627-28, 719 A.2d at 547 (discussing and distinguishing *Wilke* by asserting there was no tender of delivery).

154. *See* MD. CODE ANN., COM. LAW I § 2-510.

155. *See Washington Freightliner*, 351 Md. at 628, 719 A.2d at 546-47 (distinguishing section 2-510 from section 2-725).

156. *See id.* 628, 719 A.2d at 547 ("Thus, *Wilke* is not authority for the narrow definition of 'tender of delivery' under § 2-725.").

157. 336 F. Supp. 1128 (D. Md.), *rev'd*, 471 F.2d 546 (4th Cir. 1972).

158. *See Washington Freightliner*, 351 Md. at 628-29, 719 A.2d at 547.

159. *See id.* at 629, 719 A.2d at 547 (citing MD. CODE ANN., COM. LAW I § 2-503 (official comment 1) (1997).

160. *See Washington Freightliner*, 351 Md. at 630, 719 A.2d at 547 (characterizing Shantytown's other arguments as "an effort to avoid the rule of § 2-725 and the results of the decisions reviewed above").

the court considered Shantytown's reliance on cases where the contracts required installation or testing.[161] Shantytown had used these cases to illustrate that in some circumstances—where the seller is expressly obligated to install or to test the goods after physical delivery, such obligations might postpone accrual of a warranty claim until the seller performs all such duties.[162]

The court acknowledged existing case law that supports the proposition that express obligations of the seller to install goods after physical delivery might postpone accrual of a claim.[163] The majority, however, dismissed Shantytown's reliance on these cases because the defendants in the present case had no obligation to install the motors after they caused them to be delivered to the Lydia boatyard.[164]

The majority also drew distinctions between the present case and those in which testing obligations postponed "tender of delivery."[165] Shantytown had relied primarily upon *City of New York v. Pullman*[166] and *St. Anne-Nackawic Pulp Co. v. Research-Cottrell*[167] to support the proposition that a seller's obligation to test goods necessarily prevents the section 2-725 limitations period from beginning until the goods are tested and the standards required by the contract are met.[168] The *Washington Freightliner* majority recognized that in both cases, the courts found that tender of delivery could not occur for limitations purposes until the required tests were completed.[169] The majority explained, however, that "[u]nder the particular contracts involved in

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161. *See id.* at 630-37, 719 A.2d 548-51 (describing and addressing Shantytown's other limitations arguments).

162. *See id.* at 630, 719 A.2d 547-48.

163. *See id.* at 630, 719 A.2d at 548 ("There is case law which stands for the proposition that the clock in § 2-725 does not begin to run until after goods have been installed, where, under the contract, the seller is expressly obligated to install." (citing Dowling v. Southwestern Porcelain, Inc., 701 P.2d 954, 960 (Kan. 1985); Atlas Indus., Inc. v. National Cash Register Co., 531 P.2d 41, 47 (Kan. 1975))).

164. *See id.* at 631, 719 A.2d at 548 (concluding that "[i]n any event, in the case before us, the defendants contracted to sell engines—not to sell engines and to install them.").

165. *See id.* at 631-37, 719 A.2d at 548-552 (discussing contracts involving testing in addition to physical delivery).

166. 662 F.2d 910 (2d Cir. 1981).

167. 788 F. Supp. 729 (S.D.N.Y. 1992).

168. *See Washington Freightliner*, 351 Md. at 632-36, 719 A.2d at 548-51 (discussing *Pullman* and *St. Anne* and Shantytown's reliance thereupon).

169. *Washington Freightliner*, 351 Md. at 632-37, 719 A.2d at 548-51 (discussing *St. Anne* and *Pullman* and their respective holdings); *see also St. Anne*, 788 F. Supp. at 737 (finding that "tender of delivery did not occur until . . . defendant either had satisfied the performance warranty or repudiated its obligation to satisfy the performance warranty"); *Pullman*, 662 F.2d at 919 (finding that "tender of delivery could not occur, and did not occur, until the required test of the sample train was completed in December 1975").

those cases, testing was intended to precede tender of delivery."[170] The court explained that in such cases the parties agreed that only delivery of conforming goods would satisfy the contract terms and, therefore, tender of delivery could not occur until the required testing revealed that such goods met those requirements.[171] According to the court, in both *Pullman* and *St. Anne*, the seller was still performing under the contract while testing took place, and therefore, no breach could occur to trigger the limitations period.[172] Moreover, in these cases, the contractual references to testing were directly related to the sellers' delivery obligations.[173] The *Washington Freightliner* majority explained that such terms are more akin to express warranties in which the parties agree that the "narrow" definition of tender of delivery will apply.[174] According to the court, however, in normal cases of implied warranty, such reasoning does not apply because there has been no express dealing with pre-delivery performance guarantees fulfilled through testing.[175] In fact, the majority pointed out that federal

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170. *Washington Freightliner*, 351 Md. at 631, 719 A.2d at 548.

171. *See id.* at 633, 719 A.2d at 549 (explaining that "the *Pullman* contract negated the possibility that delivery of nonconforming goods could be tender of delivery"); *id.* at 634, 719 A.2d at 549-50 (noting that "the seller . . . 'could not have breached the Contract while it was still fulfilling the performance warranty, which does not place a time limit on defendant's obligation to correct the system.'" (quoting *St. Anne*, 788 F. Supp. at 736)).

172. *See Washington Freightliner*, 351 Md. at 632, 719 A.2d 549 (finding that "the *Pullman* contract negated the possibility that the delivery of nonconforming goods could be tender of delivery"); *id.* at 634, 719 A.2d at 550 (explaining that under the circumstances present in *St. Anne*, "no cause of action accrued while the seller 'was still performing under the Contract'" (quoting *St. Anne*, 788 F. Supp. at 735)).

173. *See Washington Freightliner*, 351 Md. at 632-33, 719 A.2d at 548-49 (explaining that the buyers under the *Pullman* contract "were not obliged to take any steps until [the seller] conformed to the specifications by delivering cars which had completed the 30 day test, since the contract specifically provided that any cars built before the 30 day test was completed were constructed at the seller's risk" (alteration in original) (internal quotation marks omitted) (quoting *Pullman*, 662 F.2d at 919)); *id.* at 633-34, 719 A.2d at 549 (citing the *St. Anne* contract's "Performance Warranty" that read: "that seller's performance is complete once the system satisfies the performance specifications . . . for a continuous three-day testing period to be conducted within 120 days of 'start up' but in any event not later than nine (9) months after mechanical completion of the [product]" (alteration in original) (internal quotation marks omitted) (quoting *St. Anne*, 788 F. Supp. at 731)); *see also infra* note 86 (discussing *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261 (D. Del. 1983) and noting the importance of this relationship to delivery in that contract dispute).

174. *See Washington Freightliner*, 351 Md. at 632-33, 719 A.2d at 548-49 (describing the differences between express and implied warranties and likening the *Pullman* contract terms to the former).

175. *See id.* at 632, 719 A.2d at 549 (explaining that "[t]he rationale of *Pullman* is not transferable to the sales transaction before us"); *id.* at 634, 719 A.2d at 550 (discussing the reasoning in *St. Anne* and concluding that "[t]his reasoning, like that in *Pullman*, is not transportable to the implied warranties sued upon in the instant matter").

courts have declined to extend the *Pullman* holding to ordinary implied warranty cases.[176]

The court also discussed the terms of the agreement between Washington Freightliner and Shantytown. The contract included the testing terms "start up and commissioning (8 Hr. Allowance)" in the price quotation.[177] The majority explained, however, that these terms were clearly not as specific as the terms of the contract in *Pullman*.[178] The majority pointed out that in cases lacking such specificity, physical delivery will trigger the statute of limitations.[179] Moreover, the court noted that the testing required in the present case was clearly not as critical as that required in the cases relied upon by Shantytown.[180] The court concluded that because tender of delivery oc-

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176. *See id.* at 634-35, 719 A.2d at 550 (noting cases that have declined extension of *Pullman* to ordinary warranty suits) (citing H. Sand & Co. v. Airtemp Corp., 738 F. Supp. 760 (S.D.N.Y. 1990); Long Island Lighting Co. v. Transamerica Delaval, Inc., 646 F. Supp. 1442 (S.D.N.Y. 1986); City of Cincinnati v. Dorr-Oliver, Inc., 659 F. Supp. 259 (D. Conn. 1986); Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261 (D. Del. 1983)).

177. *See id.* at 641-42, 719 A.2d at 553 (Eldridge, J., dissenting) for a reproduction of the price quotation; *see also supra* note 17 (explaining the weight of this contractual authority).

178. *See Washington Freightliner*, 351 Md. at 637, 719 A.2d at 551 (finding that "[i]n the case before us the words 'Start up and Commissioning (8 Hr. Allowance),' the descriptions by the witnesses of the actual commissioning, and the reports or checklists of the commissioning of the three engines initially purchased by Shantytown fall far short of demonstrating a situation comparable to *Pullman*"). The actual contract for sale, though, was not in evidence on appeal. *See id.* at 622, 719 A.2d at 544. The court considered only a price quotation, the terms of which the parties stipulated as containing the relevant terms of the formal contract. *See id.* at 622-23, 719 A.2d at 544. This deficiency in the record detracts from the overall detail of the agreement between the parties.

179. *See id.* at 637, 719 A.2d at 551 ("For the purpose of limitations on implied warranties, the ordinary rule is that the four years begins to run when the goods are delivered, and the evidence in the case before us does not alter that result."). In reaching this conclusion, the majority discusses, at length, *Ontario Hydro v. Zallea Sys., Inc.*, 569 F. Supp. 1261 (D. Del. 1983), which focused on the specificity of testing terms. *See Washington Freightliner*, 351 Md. at 636, 719 A.2d at 550-51 (discussing *Ontario Hydro*). In a passage relied upon and cited by the *Washington Freightliner* majority, the *Ontario Hydro* court explained that "[i]n the present case, there was *no finite period* for inspection. Moreover, the inspection clause was not directed to the tender of delivery aspect but rather to Hydro's right to reject the goods once they were delivered, for the clause focuses not on delivery but on the preservation of Hydro's right to reject after full delivery." *Washington Freightliner*, 351 Md. at 636, 719 A.2d at 550-51 (emphasis added) (internal quotation marks omitted) (quoting *Ontario Hydro*, 569 F. Supp. at 1268). As is apparent from this passage, the *Ontario Hydro* court also weighed in its decision the relationship between the testing clause and the parties' intent as to delivery obligations.

180. *See Washington Freightliner*, 351 Md. at 635, 719 A.2d at 550 (noting that "[i]n cases where the testing was less critical than in *Pullman* and *St. Anne*—even though it was still an element of the contract—courts have held that limitations begin with delivery and not on completion of testing").

curred upon the date of physical delivery to Lydia Yachts, Shantytown's warranty claims were barred by section 2-725.[181]

In the dissent, Judge Eldridge, joined by Judges Raker and Wilner, agreed that the "broad" definition of tender of delivery controlled in this case, and therefore, for the breach to occur, the seller must make an "offer of goods 'as if in fulfillment' of the contract['s]" conditions.[182] The three justices, however, rejected the majority's treatment of tender of delivery as a question of law.[183] According to the dissent, the real issue of the case was not whether physical delivery is legally synonymous with "tender of delivery," but whether the seller believed that it had fulfilled all contractual obligations owed to Shantytown when it had delivered these engines to Lydia's boatyard.[184] The dissent reasoned that, based on the stipulated terms of the agreement, a reasonable fact finder could conclude that the seller had not tendered delivery until the commissioning because the seller knew that even after it completed physical delivery, it remained obligated by the "commissioning" terms of the contract.[185] In reaching this opinion, the dissent reasoned that by the language of the agreement itself, "'delivery' *included* 'Start up and Commissioning (8 Hr. Allowance).'"[186]

Moreover, the dissent rejected the majority's distinction of *Wilke* and *Automated* from the present case.[187] The dissent reasoned that in both cases tender of delivery could not have occurred because "the seller knew that fulfillment of the contract required more than mere

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181. *See id.* at 637, 719 A.2d at 551.

182. *Id.* at 640, 719 A.2d at 552 (Eldridge, J., dissenting) (quoting MD. CODE ANN., COM. LAW I § 2-725 (official comment 1) (1997)) (agreeing with the majority that "the definition of 'tender of delivery' in § 2-503 and Official Comment 1 to § 2-503 provides the analytical framework within which to decide this case").

183. *See id.* at 638, 719 A.2d at 552 (disagreeing with the "erroneous premise that the determination of when tender of delivery occurred in this case is a question of law").

184. *See id.* at 640, 719 A. 2d at 552-53. The dissent explained that

> [t]he question then in a dispute over whether tender of delivery has occurred, is whether the seller has offered the goods to the buyer "as if in fulfillment" of the contract. Contrary to the majority's assertion that this is a legal determination, it is a factual determination involving inquiry into the terms of the contract and the reasonable beliefs of the seller.

Id.

185. *See id.* at 641, 719 A.2d at 553 (explaining that the finding of the trial court was "fully warranted").

186. *See id.* at 641-42, 719 A.2d at 553 (emphasis added) (discussing the terms of the contract with regard to delivery and testing).

187. *See id.* at 642-45, 719 A.2d at 553-55 (discussing *Wilke, Inc. v. Cummings Diesel Engines, Inc.*, 252 Md. 611, 250 A.2d 886 (1969) and *In re Bookbinding Automated*, 36 F. Supp. 1128 (D. Md.), *rev'd on other grounds*, 471 F.2d 546 (4th Cir. 1972) and the distinctions drawn by the majority).

physical delivery."[188] According to the dissent, the majority failed to indicate how these cases are factually at odds with the case at bar, in which the contract required not mere delivery, but delivery including start up and eight hours of testing at sea.[189]

The dissent also criticized the majority's analysis of *Pullman* and *St. Anne* as flawed.[190] The three justices argued that these are not exceptional cases in which the parties expressly invoked the "narrow" sense of tender such that only conforming goods would satisfy the contractual terms.[191] Rather, the dissent reasoned, these cases were merely direct applications of the "broad" sense of "tender of delivery," which occurs only when the seller delivers goods as if in fulfillment of all contractual obligations.[192] The dissent asserted that in both cases, the seller could not yet satisfy the "broad" meaning of tender of delivery because it knew, as did the seller in the instant case, that it remained contractually bound to perform something other than mere physical delivery of the goods.[193]

Finally, the dissent rejected the majority's assertion that *Pullman* has been limited in federal courts.[194] The dissent explained that one of the cases cited by the majority was overruled by the Second Circuit, thereby *affirming Pullman*.[195] Also, the dissent attacked the other cases used to support that assertion because they stood for the rule that tender of delivery is not contingent upon acceptance, not that tender

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188. *Id.* at 643, 719 A.2d 554 (noting the importance of the seller's knowledge in *Wilke*); *see also id.* at 644-45, 719 at 554-55 (discussing the same in *Automated*).

189. *See id.* at 644, 719 A.2d at 554-55 (proposing that "[t]he instant case presents facts substantially similar to those in *Wilke*" and that "the majority makes no attempt to distinguish the facts of [*Automated*] from the instant case"). The dissent also explained that several factually similar cases have held that tender of delivery does not occur upon physical delivery where the seller is obligated beyond physical delivery. *See id.* at 645-46, 719 A.2d at 555-56 (listing and describing the holdings of such cases).

190. *See id.* at 648, 719 A.2d at 556-57 (discussing the majority's analysis of *Pullman* and concluding that "[t]his analysis is incorrect," and that "[t]his is also true of *St. Anne*").

191. *See id.* (explaining that "*Pullman*, is nothing more than a straight-forward application of the broader meaning of 'tender of delivery'"); *id.* at 649, 719 A.2d at 557 (finding that "*St. Anne* . . . is merely an example of a contract where it was impossible for physical delivery by the seller to constitute tender of goods 'as if in fulfillment of' the contract because the contract required more").

192. *See id.* at 648-49, 719 A.2d at 556-57.

193. *See id.*

194. *Id.* at 649, 719 A.2d at 557 (criticizing the majority's attempt to exhibit a limited reading of *Pullman*).

195. *See id.* at 650, 719 A.2d at 557. The dissent explained that *H. Sand & Co., Inc. v. Airtemp Corp.*, 738 F. Supp. 760 (S.D.N.Y. 1990), a case that rejected a plaintiff's reliance on *Pullman*, was overruled by *H. Sand & Co., Inc., v. Airtemp Corp.*, 934 F.2d 450 (2d Cir. 1991). *Id.* According to the dissent, this overruling seems to affirm the holding in *Pullman* rather than to restrict it. *Id.*

of delivery must always be satisfied by physical delivery.[196] Therefore, the dissent concluded, a finder of fact would not be precluded from concluding that delivery in this case occurred only after the O.C. Princess was commissioned. According to the dissent, until that time, the seller had not yet offered goods "as if in fulfillment of" the contractual testing conditions.[197]

4. Analysis.—In *Washington Freightliner*, the majority held that tender of delivery had occurred in spite of the seller's duty to "start up and commission" and thus found Shantytown's breach of warranty claim to be time-barred.[198] Maryland's highest court, prior to *Washington Freightliner*, has never decided whether testing clauses in contracts for sale will postpone the running of the statute of limitations until after testing is complete.[199] In *Washington Freightliner*, the Court of Appeals began to set out a rule furthering the principle that tender of delivery occurs upon physical delivery and generally is not contingent upon the testing of the goods.[200] If parties *do* wish to postpone the running of the limitations period as embodied in section 2-725 of Maryland's Commercial Law, however, the court makes it clear that they must use contract terms that explicitly invoke the "narrow" sense of delivery, thus indicating that only goods conforming to contract specifications will satisfy the seller's obligations.[201] Absent such terms, the "broad" sense of delivery will apply and physical delivery of nonconforming goods will constitute tender of delivery, even if there are obligations upon the seller to test the goods.[202]

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196. *See id.* at 651, 719 A.2d at 558 (criticizing the majority's reliance on *City of Cincinnati v. Dorr-Oliver, Inc.*, 659 F. Supp. 259 (D. Conn. 1986), and *Raymond-Dravo-Lagenfelder v. Microdot, Inc.*, 425 F. Supp. 614 (D. Del. 1976)). The dissent agreed that "tender of delivery" is not contingent upon buyer's acceptance of goods. *See id.*

197. *Id.* at 652-53, 719 A.2d at 558-59.

198. *Id.* at 637, 719 A.2d at 551.

199. Courts of other jurisdictions have addressed this issue. *See, e.g.*, H. Sand & Co., Inc., v. Airtemp Corp., 934 F.2d 450, 453-54 (2d Cir. 1991) (considering the issue of when tender of delivery occurs for limitations purposes); City of New York v. Pullman, 662 F.2d 910, 918-20 (2d Cir. 1981) (same); Standard Alliance v. Black Clawson Co., 587 F.2d 813, 819-22 (6th Cir. 1978) (same); St. Anne-Nackawic Pulp Co., Ltd. v. Research-Cottrell, Inc., 788 F. Supp. 729, 734-37 (S.D.N.Y. 1992) (same); *Dorr-Oliver, Inc.*, 659 F. Supp. at 262-64 (same); Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261, 1264-68 (D. Del. 1983) (same).

200. *See infra* notes 209-225 and accompanying text (discussing the rule developed by *Washington Freightliner*).

201. *See infra* notes 209-225 and accompanying text (describing how parties may postpone delivery if they so choose).

202. *See Washington Freightliner*, 351 Md. at 637, 719 A.2d at 551 (explaining that "[f]or the purpose of limitations on implied warranties, the ordinary rule is that the four years begins to run when the goods are delivered, and the evidence in the case before us does

The Court of Appeals has indicated that this rule should be applied in a very rigid manner,[203] failing to inquire into whether the seller believed it had completed all of its performance obligations.[204] By declining to consider the subjective state of mind of the seller, the court avoids an inquiry that might yield a more flexible rule. The court also adopted a rigid rule by refusing to reason inductively from substantively analogous Maryland case law.[205] In addition, the court's reasoning is problematic because it relies upon section 2-503 of the Code and its official comment for its definition of "tender of delivery," but ignores another provision of that Comment calling for an inquiry into the subjective state of mind of the seller.[206]

Despite these problems, the resulting rule and its strict application are in keeping with the general policy goals of the U.C.C. and its Maryland counterpart.[207] Moreover, this decision notifies contracting parties in Maryland that if they wish to postpone tender of delivery beyond testing for limitations purposes, they must include clear and direct contractual language to give that intent legal effect.[208]

a. The Rule Developed: When Testing Obligations Will Postpone "Tender of Delivery."—In *Washington Freightliner*, the court indicated that unless parties include express terms in their contract indicating their intent to apply the "narrow" sense of tender of delivery as found in section 2-503's official comment 1, the "broad" sense of tender of delivery will apply.[209] Under this "broad" sense, the general rule is

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not alter that result"); *see also infra* notes 209-225 and accompanying text (discussing the rule developed by *Washington Freightliner*).

203. *See infra* notes 231-243 and accompanying text (explaining how *Washington Freightliner* indicates a strict application of the rule).

204. *See id.* at 641, 719 A.2d at 553 (Eldridge, J., dissenting) (explaining that the majority opinion is flawed because it failed to address adequately whether the seller believed it had fulfilled all its performance obligations).

205. *See id.* at 627-29, 719 A.2d at 546-47 (declining to follow *In re* Automated Bookbinding Services, Inc., 336 F. Supp. 1128 (D. Md. 1972) or *William F. Wilke, Inc., v. Cummins Diesel Engines, Inc.*, 252 Md. 611, 250 A.2d 886 (1969)).

206. *See infra* notes 244-252 and accompanying text (explaining this logical inconsistency in the majority's reasoning).

207. *See infra* notes 253-265 and accompanying text (discussing policy goals upheld by the *Washington Freightliner* decision).

208. *See infra* notes 266-269 and accompanying text (discussing the potential message sent to buyers and sellers conducting business under Maryland law).

209. *See Washington Freightliner*, 351 Md. at 625, 719 A.2d at 545 (explaining that "[i]n the context of limitations the narrow meaning of tender of delivery has been rejected by virtually every court that has considered the question"); *see also* MD. CODE ANN., COM. LAW I § 2-503 (official comment 1) (1997); *supra* notes 43-48 and accompanying text (noting that tender of delivery has two different meanings). The *Washington Freightliner* court acknowledged that in some cases, such as *City of New York v. Pullman*, parties can, by contract,

that tender of delivery occurs upon physical delivery, irrespective of testing obligations.[210] The court generates this rule through its analysis of the cases relied upon by the parties.[211]

For example, in its rejection of Shantytown's reliance on *Pullman*, the court first indicated that unless the parties agree that only *conforming* goods will satisfy the seller's performance obligations, testing clauses in the contract will not prevent physical delivery from triggering section 2-725.[212] Unlike the case at bar, the court read the contract in *Pullman* as one which required testing to ensure that the goods ultimately delivered conformed to the agreed contract specifications.[213] Such an agreement as to conformity, the court reasoned, clearly rejected the "broad" sense of tender that allows delivery of nonconforming goods to trigger section 2-725.[214] Because no such terms regarding conformity were present in the Shantytown agreement, the initial delivery of nonconforming goods constituted tender of delivery.[215] Thus the court indicated that Maryland courts are un-

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"block[ ] the possibility of applying the broader meaning of tender of delivery." *Washington Freightliner*, 351 Md. at 633, 719 A.2d at 549 (citing City of New York v. Pullman, 662 F.2d 910, 919 (2d Cir. 1981).

210. *See Washington Freightliner*, 351 Md. at 637, 719 A.2d at 551 (noting that "the ordinary rule is that the four years begins to run when the goods are delivered, and the evidence in the case before us does not alter that result").

211. In its reasoning, the *Washington Freightliner* majority addressed several of the cases relied upon by both parties—WFI and Shantytown. The parties relied most heavily on *Pullman*, 662 F.2d 910, *St. Anne-Nackawic Pulp Co., Ltd. v. Research-Cottrell, Inc.*, 788 F. Supp. 729 (S.D.N.Y. 1992); *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261 (D. Del. 1983), In re *Automated Bookbinding Services, Inc.*, 336 F. Supp. 1128 (D. Md.), and *William F. Wilke, Inc. v. Cummins Diesel Engines, Inc.*, 252 Md. 611, 250 A.2d 886 (1968). *See* Brief of Appellant MAN Roland, Inc. at 10-22, Washington Freightliner, Inc., v. Shantytown Pier, Inc., 351 Md. 616, 719 A.2d 541 (1998) (No. 38); Brief of Appellant Washington Freightliner, Inc. at 8-22, Washington Freightliner, Inc. v. Shantytown Pier, Inc., 351 Md. 616, 719 A.2d 541 (1998) (No. 38); Brief and Appendix of Appellee at 9-21, *Washington Freightliner* (No. 38).

212. *See Washington Freightliner*, 351 Md. at 632, 719 A.2d at 548.

213. *See id.* at 633, 719 A.2d at 549 (stating that "the *Pullman* contract negated the possibility that the delivery of nonconforming goods could be tender of delivery").

214. *See id.* (explaining that the *Pullman* contract rejected the "broad" sense of delivery); *see also id.* at 626, 719 A.2d at 546 (describing the "broad" and "narrow" senses of tender of delivery and noting that "[t]he proposition that nonconforming tender of goods is sufficient to trigger the statute of limitations in § 2-725 is essentially hornbook law").

215. *See id.* at 637, 719 A.2d at 551 (holding that Shantytown's claims are time-barred and reasoning that "[i]n the case before us the words 'Start up and Commissioning (8 Hr. Allowance),' the descriptions by the witnesses of the actual commissioning, and the reports or checklists of the commissioning of the three engines initially purchased by Shantytown fall far short of demonstrating a situation comparable to *Pullman*"). The court also noted that because the actual contract was not in evidence, Shantytown could not argue that the terms expressly invoked the "narrow" sense of tender of delivery. *See id.* at 624, 719 A.2d at 544 ("Because the contract of sale is not in evidence, Shantytown cannot argue that the contract has specifically defined 'tender of delivery.'").

likely to allow testing to postpone delivery for limitations purposes unless the parties agree in the contract that such testing will prevent the initial delivery of nonconforming goods.[216]

This proposition is similarly supported by the court's analysis of *St. Anne*, a case in which the contract explicitly stated that the seller's performance would not be complete until after testing.[217] According to the court, the *St. Anne* contract, like the one in *Pullman*, contemplated a testing process that would guarantee that only delivery of tested, nondefective goods would satisfy "tender of delivery."[218] The court declined to equate the terms of the delivery including "Start up and Commissioning (8 Hr. Allowance)" as an agreement upon the "narrow" sense of tender of delivery.[219] Thus, the *Washington Freightliner* decision indicates that in cases where no such agreement is found, Maryland courts are likely to apply the "broad" sense of tender of delivery and to apply the general rule that testing clauses will not prevent physical delivery from triggering section 2-725.

By ensuring that physical delivery will remain the default trigger for section 2-725, the court has taken a logical step in the right direction. Physical delivery represents an ascertainable point in time—a natural breaking point—to mark the beginning of the limitations period. The default rule allows for less ambiguity in contracts for the sale of goods and less reason for courts to become involved in contract interpretation.

Also, the rule discourages wasteful litigation. Under the rule set forth here, express terms that extend the limitations period until testing is complete will so delay the limitations period.[220] If the terms are at all unclear as to the extension of the limitations period, a logical default rule will apply and physical delivery will trigger the limitations

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216. *See id.* at 632-35, 719 A.2d at 548-50 (discussing *Pullman* and choosing not to reject its holding, but only to distinguish it from the ordinary warranty case).

217. *See id.* at 633-34, 719 A.2d at 549-50 (describing the terms of the *St. Anne* contract as containing a "performance warranty" that specified when seller's obligations were complete); *St. Anne*, 788 F. Supp. at 731 (explaining the terms of this "Performance Warranty").

218. *See id.* at 634, 719 A.2d at 549 (discussing the terms of the contract and explaining that "during the period of start-up testing, the goods were neither conforming nor nonconforming" (citing St. Anne-Nackawic Pulp Co., Ltd. v. Research-Cottrell, Inc., 788 F. Supp. 729, 735 (S.D.N.Y. 1992))).

219. *See id.* at 637, 719 A.2d at 551 (declining to equate the language of the Shantytown contract to cases in which the parties contracted for the "narrow" sense of tender of delivery).

220. *See supra* notes 209-211 and accompanying text (discussing the rule developed in *Washington Freightliner*).

period.[221] Under this strict baseline rule, potential implied warranty plaintiffs will be discouraged from filing suit if, after an informed review of the contract, the plaintiffs discover language that does not expressly extend the limitations period until testing is complete. Obligations set forth in unspecific testing clauses will not provide plaintiffs with a strong case against sellers of goods.[222] Thus, the rule discourages implied warranty suits that will ultimately be unsuccessful from being initiated in the first place. In so doing, the rule is likely to relieve the courts of the duty to resolve needless suits. Similarly, the default rule discourages implied warrant plaintiffs from wasting their resources in litigating weak cases against sellers.

Moreover, the court's analysis of *Ontario Hydro* indicates that contract terms that adopt the "narrow" sense must be clear and must contain definite terms regarding testing obligations.[223] In *Ontario Hydro*, the buyer was given the right to inspect the goods and to reject them if they did not conform to specifications.[224] The *Washington Freightliner* court, however, made note of the fact that the *Ontario Hydro* contract terms, unlike the contracts in *Pullman* and *St. Anne*, were indefinite with respect to the duration of testing and any modifications of the seller's delivery obligations.[225] Thus, the court indicated that in determining whether a contract avoids the "broad" sense of tender of delivery the definiteness of the terms is an important factor.

By considering the precision of contractual terms in its decision, *Washington Freightliner* encourages commercial parties in Maryland to draft their contracts with care and accuracy. The decision serves as a caveat to buyers under Maryland law, admonishing them to make certain that the contract language embodies their intent with specificity.[226] Furthermore, *Washington Freightliner* accomplishes this without

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221. *See id.*

222. *See id.*

223. *See id.* at 636, 719 A.2d at 550 (considering as an issue the "indefiniteness of the remaining obligations").

224. *See* Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261, 1264 (D. Del. 1983); *see also supra* notes 121-123 and accompanying text (discussing the facts of *Ontario Hydro*).

225. *See Washington Freightliner*, 351 Md. at 636, 719 A.2d at 550-51. The court noted that, in the *Ontario Hydro* contract,

> there was no finite period for inspection. Moreover, the inspection clause was not directed to the tender of delivery aspect but rather to Hydro's right to inspect the goods and reject them once they were delivered, for the clause focuses not on delivery but on the preservation of Hydro's right to reject after full delivery.

Id. (internal quotation marks omitted (quoting *Ontario Hydro*, 569 F. Supp. at 1268); *see also Ontario Hydro*, 569 F. Supp. at 1264 (discussing the terms of the Ontario Hydro contract).

226. *See Washington Freightliner*, 351 Md. at 636, 719 A.2d at 550-51 (taking into consideration the specificity of contract terms in deciding whether a testing clause extended the limitations period in section 2-725).

inhibiting the parties' freedom of contract rights. The decision does not prevent buyers and sellers from postponing the limitations period until after testing is complete;[227] instead it simply warns the parties that they must utilize unambiguous terms to effectuate their goals.[228]

Furthermore, the court's consideration of the definiteness of terms encourages the use of contractual provisions that are less likely to be disputed in court. Parties will be less likely to expend resources litigating a contractual provision that expressly alters the limitations period. Similarly, by requiring consideration of the precision of terms, the court has made it easier for trial courts to apply section 2-725 where contract provisions lack specificity.[229] If the terms of the contract are imprecise, the courts will have an easier decision to simply apply the default rule that tender of delivery occurs upon the date of physical delivery.[230]

b. Signaling that the Rule will be Strictly Applied.—Washington Freightliner also signals that this rule is to be applied rigidly by courts, without significant factual inquiry into whether the seller tendered goods "as if in fulfillment" of the contract.[231] The court makes clear that whether delivery has been postponed for limitations purposes is an issue of law.[232] Although strongly urged by the dissent, the majority does not inquire into the subjective state of mind of the seller when

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227. *See id.* at 631-35, 719 A.2d at 548-50 (rejecting comparison of the case at bar, which involved implied warranties, to cases that involved express warranties to deliver goods that met specific performance standards). To extend the period of limitations, the parties could simply agree to an express warranty of future performance. Nowhere in the *Washington Freightliner* decision did the court restrict parties from implicitly altering the limitations period for suits arising out of breaches of express warranty. To limit the autonomy of the parties in this manner would be in conflict with section 2-725. *See* MD. CODE ANN., COM. LAW I § 2-725(2) (explaining that "where a warranty explicitly extends to future performance" the limitations period would not begin to run until "the breach is or should have been discovered").

228. *See Washington Freightliner*, 351 Md. at 636, 719 A.2d at 550-51.

229. *See supra* notes 55-57 and accompanying text (explaining that absent a dispute as to the terms altering tender of delivery, a court need only apply section 2-725 mechanically, using the date of physical delivery as the trigger for the limitations period).

230. *See supra* notes 55-57 and accompanying text (explaining that absent a dispute as to the terms altering tender of delivery, a court need only apply section 2-725 mechanically, using the date of physical delivery as the trigger for the limitations period).

231. *See id.* at 624, 719 A.2d at 545 (explaining that the issues before the court are questions of law); *id.* at 640, 719 A.2d at 552 (Eldridge, J., dissenting) (criticizing the majority's treatment as an issue of law whether "the seller has offered goods to the buyer 'as if in fulfillment' of the contract").

232. *See Washington Freightliner*, 351 Md. at 624, 719 A.2d at 545 ("Shantytown argues that tender of delivery had been postponed [for statute of limitations purposes]. As presented in this case, that issue is one of law.").

it first delivers goods.[233] Rather, the majority devotes most of its attention to the actual agreement between the parties and whether that agreement can be read as explicitly adopting the "narrow" sense of delivery.[234] By treating tender of delivery as a question of law and deemphasizing the importance of whether the seller believed its performance was complete, *Washington Freightliner* indicates that if parties wish to postpone tender of delivery until after testing, such intent must appear expressly in the contractual language. That this rule is meant to be strictly applied is also evidenced by the court's resistance to clearly analogous persuasive authority that analyzes tender of delivery for purposes other than determining limitations issues.[235] *Wilke*, for example, presents a very similar fact pattern where the seller was obligated to deliver, start up, and test a generator.[236] In *Wilke*, however, the court did not analyze tender of delivery for limitations purposes, but rather for the purposes of determining when the risk of loss passes from the buyer to the seller under section 2-510 of the Maryland Code.[237] In *Wilke*, tender of delivery was postponed because section 2-510 applied the "narrow" definition of tender of delivery.[238] As

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233. *See id.* at 641, 719 A.2d at 553 (Eldridge, J., dissenting) (discussing what the dissent perceives as the true issue of the case and explaining that "[i]n this case, therefore, it was necessary to determine as a matter of fact whether, when they delivered the engines to Lydia for installation in the O.C. Princess, the defendants believed that they had fulfilled their contract obligations, despite the fact that the engines later proved to be nonconforming").

234. *See Washington Freightliner*, 351 Md. at 632-37, 719 A.2d at 548-51 (discussing the contracts in *Pullman* and *St. Anne* as adopting the "narrow" sense of delivery and distinguishing them from the agreement in the present case).

235. *See id.* at 627-30, 719 A.2d at 546-47 (rejecting Shantytown's reliance upon factually similar cases such as In re *Automated Bookbinding Services, Inc.*, 336 F. Supp. 1128 (D. Md. 1972) and *William F. Wilke v. Cummins Diesel Engines*, 252 Md. 611, 250 A.2d 886 (1969)); *see also supra* notes 108-114 and accompanying text (discussing *Wilke*); *supra* notes 157-159 and accompanying text (discussing *Automated*).

236. *See Wilke*, 252 Md. at 613, 250 A.2d at 887 (describing the obligations of the seller as evidenced by the contractual language).

237. *See id.* at 616-17, 250 A.2d at 889-90 (analyzing the *Wilke* dispute as an issue of "risk of damage" rather than one of limitations); *see also Washington Freightliner*, 351 Md. at 628, 719 A.2d at 547 ("The question in *Wilke* was when the risk of loss passed from seller to buyer under § 2-510(1)."); MD. CODE ANN., COM. LAW I § 2-510(1) (1997) ("Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.").

238. *See Wilke*, 252 Md. at 618, 250 A.2d at 890 (discussing official comment to section 2-510 and noting that the Comment states regarding subsection (1) that "the seller by his individual action cannot shift the risk of loss to the buyer unless his action *conforms with all the conditions resting on him under the contract*" (internal quotation marks omitted) (emphasis added) (quoting MD. CODE ANN., COM. LAW I § 2-510(1) (official comment 1) (1997))); *see also Washington Freightliner*, 351 Md. at 628, 719 A.2d at 547 (explaining that in *Wilke*, the Maryland Court of Appeals "made it expressly clear that § 2-510 applied the narrow definition of 'tender of delivery'" (citing *Wilke*, 252 Md. at 618, 250 A.2d at 890)).

Washington Freightliner makes clear, however, section 2-725 is triggered by the "broad" sense of tender of delivery which, according to the court, imposes a far stricter standard for allowing testing to postpone the tender of delivery.[239] The court's conclusion regarding section 2-725 indicates the court's desire to impose a separate rule for limitations purposes that will not borrow from cases that employ less restrictive standards for when testing clauses will postpone tender of delivery.

The intended rigidity of this rule is further supported by *Washington Freightliner's* rejection of *Automated*, an analogous case in which a contract required a seller to ensure that a bookbinding machine met certain performance standards.[240] The *Washington Freightliner* court did not attempt to distinguish the facts in *Automated* from those of the case at bar, noting only that "[i]t is apparent that the seller in the *Automated Bookbinding* case had not tendered goods 'as if in fulfillment of' the contract's conditions."[241] Rather, the court explained *Automated* as dealing with an issue of "possession" under Maryland Code section 9-312(4), not one of limitations under section 2-725, and then quickly distinguished the case by discussing "Maryland cases which *do* analyze § 2-725."[242] This summary rejection of analogous case law further indicates that the rule developed by *Washington Freightliner* should not be construed liberally in light of cases that may be factually similar but do not expressly deal with limitations issues.[243]

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239. *See Washington Freightliner*, 351 Md. at 624-27, 719 A.2d at 545-46 (applying the "broad" sense of tender of delivery to warranty claims for the purpose of section 2-725); *see also supra* notes 209-225 and accompanying text (explaining the rule set forth by *Washington Freightliner* for postponing tender of delivery for limitations purposes).

240. *See In re* Automated Bookbinding Servs. Inc., 336 F. Supp. 1128, 1131 (D. Md. 1972) *rev'd*, 471 F.2d 546 (4th Cir. 1972) (explaining that the contract in this case required the seller to "put said property in first class running order" (internal quotation marks omitted)).

241. *Washington Freightliner*, 351 Md. at 629, 719 A.2d at 547 (quoting MD. CODE ANN., COM. LAW I § 2-503 official comment 1 (1997)); *see id.* at 644, 719 A.2d at 555 (Eldridge, J., dissenting) (noting that "the majority makes no attempt to distinguish the facts of [*Automated*] from those of the instant case").

242. *Washington Freightliner*, 351 Md. at 629, 719 A.2d at 547 (emphasis in original); *see id.* (discussing *Automated* as involving an issue of "possession" and citing the following Maryland cases dealing with section 2-725: *Mills v. International Harvester Co.*, 554 F. Supp. 611 (D. Md. 1982); *Mattos, Inc., v. Hash*, 279 Md. 371, 368 A.2d 993 (1977); Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460 (1976)).

243. This proposition is further supported by *Washington Freightliner's* clear agreement with cases that limit *Pullman*, a case in which limitations did not begin until after testing and inspection was complete. *See id.* at 634, 719 A.2d at 550 (noting that "[f]ederal district courts, including those in the Second Circuit, have not read *Pullman* as an invitation to postpone the accrual of limitations made under U.C.C. § 2-725 beyond actual delivery" (citing H. Sand & Co. v. Airtemp Corp., 738 F. Supp. 760 (S.D.N.Y. 1990)); *see also* Long

c. A Logical Flaw in the Court's Reasoning.—The court's adoption of this strict rule, however, is based on a problematic line of reasoning. As the court makes clear, a decision of when "tender of delivery" occurs for limitations purposes is rooted in section 2-503 and its official comment.[244] The majority refers to this section of the Code throughout its opinion, analyzing "tender of delivery" in relation to the two definitions provided in section 2-503's official comment.[245] The court fails, however, to address adequately an important clause within that Comment.

The Comment clearly states that under the "broad" sense of delivery—the sense invoked and applied by the majority, "tender of delivery" can occur when a seller offers goods "as if in fulfillment of [the contract's] conditions."[246] Logical application of this language requires that to determine when delivery occurs, courts must inquire into whether the seller believed its conduct had fulfilled the conditions of the contract. The majority, however, makes no such factual inquiry.[247] Instead, the court simply decides, as a matter of law, that the seller satisfied the "broad" sense of delivery upon physical delivery of the goods.[248]

This apparent inconsistency in reasoning leads the court to make weak distinctions of cases interpreting Maryland law such as *Wilke* and *Automated*.[249] As a preliminary matter, it should be noted that the court can *legally* distinguish these cases to prevent their use as mandatory authority.[250] The court not only made these legal distinc-

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Island Lighting Co. v. Transamerica Delaval, Inc., 646 F. Supp. 1442, 1445 (S.D.N.Y. 1986) (finding *Pullman* inapplicable because the entire balance of goods in the case at bar was delivered in a single installment); City of Cincinnati v. Dorr-Oliver, Inc., 659 F. Supp. 259, 264 (D. Conn. 1986) (similarly distinguishing *Pullman*); Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261, 1267 (D. Del. 1983) (distinguishing *Pullman* on both factual and policy grounds).

244. *See Washington Freightliner*, 351 Md. at 624-28, 719 A.2d at 545-46 (explaining that the meaning of tender of delivery for limitations purposes is found in section 2-503 and its official comment).

245. *See id.* at 624-638, 719 A.2d at 545-551 (explaining the majority opinion and citing MD. CODE ANN., COM. LAW I § 2-503 and its official comment 1 throughout).

246. MD. CODE ANN., COM. LAW I § 2-503 official comment 1 (1997).

247. *See Washington Freightliner*, 351 Md. at 624-638, 719 A.2d at 545-51 (explaining the majority opinion, but failing to inquire into the subjective beliefs of the seller).

248. *See id.* at 637, 719 A.2d at 551.

249. *See generally id.* at 627-29, 719 A.2d at 546-47 (distinguishing *Wilke* and *Automated* from the case at bar).

250. For example, the majority is not bound by *Wilke* because that case turned upon "when the risk of loss passed from seller to buyer under § 2-510(1)[,]" *id.* at 628, 719 A.2d at 547, and not when tender of delivery occurred for the purposes of section 2-725. Similarly, the issue in *Automated* is distinguished as one of possession of goods in a bankruptcy dispute rather than one of limitations in a warranty action. *See In Re* Automated Bookbind-

tions, but also explained that under the facts of both cases, the broad definition of delivery was not satisfied, nor did the seller offer the goods *as if in fulfillment of* the contract's conditions.[251] Here the court's reasoning is problematic for two reasons. First, in distinguishing these cases, the majority apparently makes issue of the subjective intent of the seller, a course that it refuses to take in dealing with the case at bar.[252] Second, while the majority discusses these two cases at length as ones that warrant postponement of tender of delivery, it completely fails to distinguish them factually from the present case. These inconsistencies lead to a conclusion and a rule that is legally sound, yet logically flawed.

d. Supporting the Strict Rule on Policy Grounds.—While the court's reasoning is troublesome and somewhat unstable, the resulting rule is not. The rule developed by *Washington Freightliner* holds that unless parties clearly contract for delivery of conforming goods, the general rule will apply and physical delivery of nonconforming goods will trigger section 2-725 regardless of testing obligations.[253] The policy goals of section 2-725 support this rule and its potentially strict enforcement. One of the purposes of section 2-725 is to give sellers clear notice of when they are no longer liable for breach of warranty claims by aggrieved buyers.[254] As *Washington Freightliner* explains, when sellers explicitly contract for conforming goods, tender

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ing Servs., 336 F. Supp. 1128, 1134-35 (analyzing a dispute between creditors of a bankrupt company according to an issue of possession).

251. *See Washington Freightliner*, 351 Md. at 628, 719 A.2d at 546 ("Under the facts in *Wilke* there was no tender of delivery in either the narrow or the broad sense. The goods were not conforming and the seller did not make 'an offer of goods . . . under a contract as if in fulfillment of its conditions.'" (quoting MD. CODE ANN., COM. LAW I § 2-503 (official comment 1) (1997))); *id.* at 629, 719 A.2d at 547 ("It is apparent that the seller in the *Automated Bookbinding* case had not tendered goods 'as if in fulfillment of' the contracts conditions." (quoting MD. CODE ANN., COM. LAW I § 2-503 (official comment 1))).

252. *See Washington Freightliner*, 351 Md. at 624-638, 719 A.2d at 545-51 (explaining the majority opinion, but failing to inquire into the subjective beliefs of the seller).

253. *See supra* notes 209-225 and accompanying text (discussing the rule formed by the *Washington Freightliner* majority).

254. *See Ontario Hydro*, 569 F. Supp. at 1266. In *Ontario Hydro*, the court noted that

> [w]hile this limitation period may appear relatively short, it was designed by the drafters of the Uniform Commercial Code to serve the important function of providing a point of finality for businesses after which they could destroy their business records without the fear of a subsequent breach of contract for sale or breach of warranty suit arising to haunt them . . . [h]ence, the finality necessary to promote the flow of commerce is effectuated by the limitation period.

Id. (citing 3 W.D. HAWKLAND, UNIFORM COMMERCIAL CODE SERVICE § 2-725:02, at 479 (1938)).

of delivery may be postponed beyond testing.[255] When they do not, tender of delivery will occur upon physical delivery or installation of the goods.[256]

By creating a strict rule requiring clear agreement as to tender of delivery, *Washington Freightliner* serves this purpose of section 2-725. Under a contract specifically incorporating a narrow sense of delivery, a seller would know, because of the terms of the contract, that the date upon which the goods conform is also the date that triggers the limitations period.[257] By imposing a rule that all other agreements are to be governed by the "broad" sense of delivery, sellers are given notice that the period of vulnerability will begin upon physical delivery or installation, and end four years later, regardless of remaining obligations to test the goods or subject them to inspection.[258]

A strict, dichotomous rule also is supported by one of the general policy goals of the U.C.C., that is, "to simplify, clarify and modernize the law governing commercial transactions."[259] The rule proposed by *Washington Freightliner* envisions a simple and clear division of cases for limitations purposes.[260] In the first category, there are cases in which the parties clearly agree that the "narrow" definition of tender of delivery will govern the contract.[261] In such cases, section 2-725 can be mechanically applied from the date upon which testing shows the goods to be conforming.[262] In the second category, there are cases that by their contract terms exhibit something less than a clear intention to invoke this "narrow" sense.[263] In these cases, section 2-725 also can be mechanically applied, regardless of any unspecific inspection

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255. *See Washington Freightliner*, 351 Md. at 633, 719 A.2d at 549 (distinguishing *Pullman* from the present case and explaining that "the *Pullman* contract negated the possibility that delivery of nonconforming goods could be tender of delivery," and stating that "[t]he *Pullman* contract blocked the possibility of applying the broader meaning of tender of delivery").

256. *See id.* at 637, 791 A.2d at 551 (holding that "[f]or the purposes of limitations on implied warranties, the ordinary rule is that the four years begins to run when the goods are delivered, and the evidence in this case does not alter that result").

257. *See* MD. CODE ANN., COM. LAW I § 2-725 (1997) (explaining the four-year limitations period).

258. *See generally id.* (implying that four years after delivery sellers will no longer be subject to suit).

259. U.C.C. § 1-102(2)(a) (1999).

260. *See supra* notes 209-225 and accompanying text (discussing the rule embodied by the *Washington Freightliner* decision).

261. *See Washington Freightliner*, 351 Md. at 632-35, 719 A.2d at 548-50 (describing *Pullman* and *St. Anne* as such cases).

262. *See* MD. CODE ANN., COM. LAW I § 2-725 (1997) (explaining the applicable limitations period of breach of warranty claims).

263. *See Washington Freightliner*, 351 Md. at 637, 719 A.2d at 551 (distinguishing the case at bar as "fall[ing] far short of demonstrating a situation comparable to *Pullman*").

terms, from the date of physical delivery or installation.[264] This "one or the other" characteristic of the *Washington Freightliner* analysis brings more clarity and simplicity than any case-by-case flexible and subjective standard of tender of delivery could.

Finally, this rule is desirable because it protects sellers of commercial goods from being liable for an unreasonable amount of time. The strict rule adopted by *Washington Freightliner* protects sellers in cases where a third party is responsible for the installation of goods before testing. This restrictive rule prevents a seller's period of liability from being unreasonably extended due to any unforeseen delays caused by the party responsible for installation. A contrary rule would allow the limitations period to be postponed indefinitely while installation of the goods occurred, thus leaving the seller at the mercy of the installing party. Such a rule would render the statute of limitations wholly ineffective by providing an inherently flexible period of limitations.[265]

e. Sending a Message to Commercial Parties in Maryland.—The rule imposed in *Washington Freightliner* is not as harsh as it appears. The rule sends a message to commercial buyers doing business under Maryland law that mere testing obligations in a contract will not serve to postpone delivery for limitations purposes.[266] The strict application of this rule should communicate to buyers that if they wish to bind a seller beyond mere physical delivery or installation for implied warranty purposes, they should specifically invoke the "narrow" sense of tender of delivery by including language in their contract expressing such intent.[267] *Washington Freightliner* also warns buyers to be cautious and specific in drafting such clauses, indicating that even terms that clearly require testing by the seller[268] will not affect the general

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264. *See* MD. CODE ANN., COM. LAW I § 2-725 (1997) (explaining the applicable limitations period of breach of warranty claims).

265. *See* Ontario Hydro v. Zallea Sys., Inc., 569 F. Supp. 1261, 1266 (D. Del. 1983) (explaining that the limitations period provides "a point of finality," and thus "promote[s] the flow of commerce").

266. *See Washington Freightliner*, 351 Md. at 632-37, 719 A.2d at 548-51 (distinguishing the case at bar from cases in which specific contract terms allowed postponing of delivery until testing was completed).

267. *See id.*; *see also supra* notes 209-243 and accompanying text.

268. *See* 351 Md. at 636, 719 A.2d at 550-51 (discussing *Ontario Hydro* and the issue of indefiniteness as it pertains to postponing delivery). Under *Washington Freightliner*, such terms as "Start up and Commissioning (8 Hr. Allowance)" can be considered as an example of language that is insufficiently specific to postpone delivery for limitations purposes. *See id.* at 637, 719 A.2d at 551 (citing these terms of the agreement and finding them insufficient to postpone delivery until after testing is complete).

rule that section 2-725 begins to run upon physical delivery.[269] Only when parties unequivocally invoke the "narrow" sense of delivery or agree that tender of delivery is contingent upon the completion of testing will the limitations period extend beyond the four years following physical delivery.[270]

5. Conclusion.—In *Washington Freightliner*, the Court of Appeals held that under a contract for the sale of marine engines, the limitations period for implied warranty claims in section 2-725 of the Maryland Commercial Law Article began to run when the seller physically delivered the goods, not when the seller fulfilled its obligations to test the engines.[271] With this decision, the court has sent a message that only the clearest contract language will postpone accrual of the limitations period beyond physical delivery of goods.[272] Also, the court has indicated that this is not a flexible rule.[273] The court's reasoning is problematic in determining when "tender of delivery" occurred because it fails to consider the subjective state of mind of the seller, a course of inquiry suggested by section 2-503 and its official comment.[274]

Nevertheless, the rule imposed by the court upholds the purpose of the statute of limitations in section 2-725 by providing sellers with a more clear idea of when they might be subject to suit.[275] Moreover, *Washington Freightliner* puts buyers on notice as to the steps they need to take to ensure the longest limitations period possible. Under this decision, the process involves a specific agreement that the "narrow" sense of delivery will govern the contract and that only the delivery of tested, nondefective goods will trigger the statute of limitations.[276] While the rule as applied in the present case may seem harsh on buy-

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269. *See Washington Freightliner*, 351 Md. at 637, 719 A.2d at 551 (noting that the general rule is that physical delivery triggers section 2-725).

270. *See id.*

271. *See id.*

272. *See supra* notes 266-269 and accompanying text (describing the message sent by the decision in *Washington Freightliner*).

273. *See supra* notes 231-243 and accompanying text (discussing how the decision indicates a rigid rule).

274. *See supra* notes 244-252 and accompanying text (critiquing the reasoning of the *Washington Freightliner* majority).

275. *See supra* notes 253-265 and accompanying text (analyzing *Washington Freightliner* on policy grounds).

276. *See supra* notes 209-232 and accompanying text (explaining the rule developed in *Washington Freightliner*).

ers, it need not be if they heed its warnings and take greater care in the future when entering contracts for sale.

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IV. CONSTITUTIONAL LAW

A. *Applying the Exclusionary Rule to Civil Forfeitures: Stare Decisis of Misinterpreted Case Law Prevails*

In *One 1995 Corvette v. Mayor of Baltimore*,[1] the Court of Appeals of Maryland held that the exclusionary rule applies to all civil *in rem* forfeitures in Maryland.[2] The court concluded that evidence obtained from a vehicle search conducted without probable cause was not admissible in a civil forfeiture proceeding in which it was alleged that the vehicle was used to transport illegal drugs.[3] In doing so, the Court of Appeals reversed the decision of the Court of Special Appeals[4] which had relied on the Supreme Court's continued refusal to extend the exclusionary rule to civil proceedings.[5] To achieve this universal application, the Court of Appeals relied on a long list of cases interpreting the relevant United States Supreme Court decision, *One 1958 Plymouth Sedan v. Pennsylvania*,[6] as categorizing all civil *in rem* proceedings as quasi-criminal and therefore universally applying the exclusionary rule.[7] The Court of Appeals, however, applied a distorted form of stare decisis to preserve a misinterpretation of outdated case law. In addition, the Court of Appeals's universal application of the exclusionary rule to all civil *in rem* forfeitures departs from criminal application of the exclusionary rule where exceptions have been made. Although the Court of Appeals's decision was motivated by the court's strong policy against civil forfeiture,[8] it results in the inconsistent application of the exclusionary rule in Maryland.

1. The Case.—The police arrested the petitioner, Weldon Connell Holmes, on drug-related charges and seized his 1995 Corvette after they stopped his car and found 548 grams of cocaine inside.[9] Prior

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1. 353 Md. 114, 724 A.2d 680 (1998), *cert. denied*, 120 S. Ct. 321 (1999).

2. *Id.* at 139, 724 A.2d at 693-94.

3. *Id.*

4. *See* Mayor of Baltimore v. One 1995 Corvette, 119 Md. App. 691, 706 A.2d 43 (1998), *rev'd, One 1995 Corvette*, 353 Md. 114, 724 A.2d 680.

5. *Id.* at 808-10, 706 A.2d at 101.

6. 380 U.S. 693 (1965) (holding that the exclusionary rule applied to a civil *in rem* forfeiture).

7. *See One 1995 Corvette*, 353 Md. at 123-24 nn.5-6, 724 A.2d at 684-85 nn.5-6.

8. *Id.* at 138-39, 724 A.2d at 692 (noting that "forfeitures are disfavored in law because they are considered harsh extractions, odious, and to be avoided when possible" (internal quotation marks omitted) (quoting State *ex rel.* Frederick City Police Dep't v. One 1998 Toyota Pick-Up Truck, 334 Md. 359, 375, 639 A.2d 641, 649 (1994))).

9. *See id.* at 116-17, 724 A.2d 681. Police officers conducting a general surveillance saw Holmes park his red Corvette. *See id.* at 116, 724 A.2d at 681. The officers, members of the Northwest District Drug Enforcement Unit, who were unfamiliar with Holmes, watched

to the preliminary hearing, the State's Attorney dropped the criminal charges,[10] but subsequently filed an action for forfeiture of the Corvette based on article 27, section 297, of the Maryland Code,[11] which provides for the forfeiture of vehicles used to transport illegal substances and for the forfeiture of any property obtained in exchange for illegal controlled substances.[12]

The petitioner moved to dismiss the case, arguing that the evidence was obtained in violation of his Fourth Amendment rights and, therefore, should be suppressed under the exclusionary rule.[13] At the conclusion of the hearing, the judge allowed both parties to submit memoranda on the issue, and ruled in favor of Holmes.[14] The trial court determined that the police lacked probable cause to believe controlled, dangerous substances were in the vehicle, and based on *One 1958 Plymouth Sedan v. Pennsylvania*, concluded that the exclusion-

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an unknown man give Holmes a black bag before he drove away. *See id.* After stopping Holmes, one of the officers told him that he believed that Holmes had participated in a drug transaction and asked to see inside the bag, explaining that the officers would request a drug-sniffing dog if he refused. *See id.* Holmes quickly opened and closed the bag. *See id.* An officer saw a plastic bag that he believed contained illegal drugs, and the police then arrested Holmes on drug-related charges. *See id.* An officer removed the bag from the car, looked inside, and discovered approximately 500 grams of cocaine. *See id.* at 116-17, 724 A.2d at 681. Officers also found smaller bags containing an additional 48 grams of cocaine inside a brown paper bag in the car. *See id.* at 117, 724 A.2d at 681.

10. *Id.* at 116 n.1, 724 A.2d at 681 n.1. The record did not reflect the reason for dropping the criminal case; however, the State revealed at the forfeiture hearing that the prosecutor was concerned about defeating a motion to suppress. The constitutionality of the stop, search and seizure were, therefore, never adjudicated. *Id.*

11. *See* MD. ANN. CODE art. 27, § 297 (1996). The statute provides, in pertinent part:

> (b) *Property subject to forfeiture.*—The following shall be subject to forfeiture and no property right shall exist in them:
>
> (1) All controlled dangerous substances . . .
>
> (2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled dangerous substance . . .
>
> . . . .
>
> (4) All . . . *vehicles . . . which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) of this subsection* . . .
>
> . . . .
>
> (10) Everything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance in violation of this subheading, all proceeds traceable to such an exchange . . . .

Id. Legislative changes between Holmes's arrest in 1996 and the Court of Appeals's decision did not substantially alter the relevant subsections. *See One 1995 Corvette*, 353 Md. at 117 n.2, 724 A.2d at 681 n.2.

12. *See One 1995 Corvette*, 353 Md. at 117, 724 A.2d at 681-82.

13. *See id.* at 117-18, 724 A.2d at 682. The trial judge denied Holmes's motion to dismiss three times, but allowed a continuing motion for the record. *See id.*

14. *See id.*

ary rule applied to civil forfeiture cases and dismissed the case.[15] The State appealed.[16]

The Court of Special Appeals reversed the lower court's decision.[17] Referring to the "undiluted civil status of the proceeding," the court held that the exclusionary rule does not apply to such forfeitures.[18] The court explained that *One 1958 Plymouth* does not stand for the proposition that the exclusionary rule should be applied to illegal searches and seizures in civil *in rem* forfeitures cases.[19]

Holmes appealed, and the Court of Appeals granted certiorari to decide whether the exclusionary rule applied to civil *in rem* forfeitures.[20]

2. Legal Background.—

a. Exclusionary Rule in Criminal Proceedings.—The exclusionary rule was developed in the early twentieth century by the Supreme Court and requires the suppression of any evidence obtained through an illegal search and seizure in federal courts.[21] State acceptance of the rule, however, was slow, and only one-third of the states had adopted the exclusionary rule by the middle of the twentieth century.[22] Nevertheless, the Supreme Court extended the applicability of the exclusionary rule to the states in 1961.[23]

The Supreme Court has allowed three exceptions to the application of the exclusionary rule in criminal cases. First, the exclusionary

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15. *See* Mayor of Baltimore v. One 1995 Corvette, 119 Md. App. 691, 698, 706 A.2d 43, 46 (1998).

16. *See id.*

17. *See id.* at 810, 706 A.2d at 101.

18. *Id.* at 809, 706 A.2d at 101.

19. *Id.* at 808-10, 706 A.2d at 101.

20. *See One 1995 Corvette*, 353 Md. at 139, 724 A.2d at 693. After the Court of Appeals's decision, the State appealed to the Supreme Court challenging the interpretation of *One 1958 Plymouth* as applying the exclusionary rule to all civil *in rem* forfeitures. The Supreme Court denied certiorari. 120 S. Ct. 321 (1999).

21. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 398 (1914) (excluding evidence illegally seized by federal officials and finding that the Fourth Amendment did not apply to evidence illegally seized by local officials).

22. *See* Mapp v. Ohio, 367 U.S. 643, 651 (1961). In *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled by Mapp*, 367 U.S. at 654-55, the Supreme Court held that the exclusionary rule did not apply to the states. *Id.* at 33. Despite this ruling, half of the remaining states that considered the issue enacted the exclusionary rule for criminal proceedings during the 1950s because of a lack of alternative protections and remedies. *See Mapp*, 367 U.S. at 651; *see also* People v. Cahan, 282 P.2d 905, 911 (Cal. 1995) (applying the exclusionary rule to criminal proceedings only after "other remedies have failed to secure compliance with the constitutional provisions").

23. *See Mapp*, 367 U.S. at 655 (holding "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court").

rule does not prohibit the testimony of a witness identified through evidence obtained in an illegal search.[24] Second, the exclusionary rule does not prohibit the use of illegally seized evidence to impeach a criminal defendant.[25] Third, the exclusionary rule does not apply when law enforcement officers act in good faith upon a warrant they reasonably believed to be lawful.[26]

b. Application of Exclusionary Rule to Civil Forfeiture Proceedings.—In 1886, the Supreme Court, in *Boyd v. United States*,[27] held that the Fourth Amendment applied to a civil customs forfeiture provision deemed "quasi criminal."[28] In *Boyd*, the Government seized thirty-five cases of plate glass, alleging that the owners committed fraud punishable by forfeiture under the customs revenue laws.[29] The defendant entered a claim for the goods.[30] During the trial, the court granted an order requiring the defendant to produce invoices to prove the contents of the cases.[31] The defendant produced the documents while objecting that this order required self-incrimination and was therefore inadmissible.[32] The trial court entered judgment upon a jury verdict in favor of the United States, which was subsequently affirmed by the circuit court.[33] The Supreme Court granted certiorari to examine whether the compelled production of private documents constituted an illegal search and seizure under the Fourth Amendment.[34] The Supreme Court held that the compelled production of personal papers violated the Fifth Amendment privilege against self-incrimination and also violated the Fourth Amendment's ban on unreasonable searches and seizures.[35]

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24. *See, e.g.*, United States v. Ceccolini, 435 U.S. 268, 280 (1978) (Burger, C.J., concurring in the judgment) (discussing how the exclusionary rule did not apply to testimony of a witness identified through an illegal search).

25. *See* United States v. Havens, 446 U.S. 620, 627 (1980) (concluding that the policies of the exclusionary rule do not bar the use of illegally obtained evidence for impeachment purposes).

26. *See* United States v. Leon, 468 U.S. 897, 922-24 (1984) (clarifying that the "good faith exception" is applicable because the purpose of the exclusionary rule is to deter police misconduct).

27. 116 U.S. 616 (1886).

28. *Id.* at 634.

29. *Id.* at 617-18.

30. *See id.* at 618.

31. *See id.*

32. *See id.*

33. *See id.*

34. *Id.* at 622.

35. *Id.* at 634-35. This holding was later abrogated in *Andresen v. Maryland*, 427 U.S. 463 (1976), which held that the search of a defendant's office and seizure of his business

The Court in *Boyd* recognized the "intimate relation" between the Fourth Amendment prohibition on illegal searches and seizures and the Fifth Amendment prohibition of coerced self-incrimination, noting that illegal searches and seizures are usually intended to make persons incriminate themselves.[36] Further, the Court stated that while forfeiture may be civil in form, it is criminal in nature.[37] Under the applicable federal customs statute, forfeiture, along with a fine and incarceration, was available as a criminal penalty.[38] The Court found that had Boyd been indicted, he could have been fined and imprisoned, and the glass could have been forfeited.[39] The Court then stated that the Government could not decline to file a criminal indictment so that illegally obtained evidence could be salvaged for use in a civil procedure of forfeiture.[40] The Court declared that civil proceedings that penalize criminal offenses are quasi-criminal, and therefore, the Fourth Amendment prohibition against illegal searches and seizures and the Fifth Amendment prohibition against self-incrimination clause apply.[41]

Over fifty years later, the Supreme Court, in *One 1958 Plymouth Sedan v. Pennsylvania*,[42] held that the exclusionary rule applied to a forfeiture proceeding.[43] In *One 1958 Plymouth*, two officers of the Pennsylvania Liquor Control Board stopped a car that had just crossed into the state from New Jersey after noting that the vehicle was riding low in the rear.[44] The officers questioned the driver, and upon searching the car and trunk, found thirty-one cases of liquor that did not have Pennsylvania tax seals.[45] They arrested the driver and charged him with violating Pennsylvania liquor control statutes.[46]

Pursuant to Pennsylvania law, the State filed a petition to seize the car.[47] The trial court dismissed the petition because the incriminating evidence, the liquor, was obtained in an illegal search.[48] The

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records did not violate his Fifth Amendment protection against self-incrimination. *Id.* at 471-74.

36. *Boyd*, 116 U.S. at 633.
37. *Id.* at 634.
38. *See id.*
39. *Id.*
40. *Id.*
41. *See id.* at 634-35.
42. 380 U.S. 693 (1965).
43. *Id.* at 702.
44. *See id.* at 694.
45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.* at 695.

Superior Court of Pennsylvania, an intermediate appellate court, reversed the judgment, and the Supreme Court of Pennsylvania affirmed the decision.[49] Citing the Supreme Court's application of the exclusionary rule in *Mapp v. Ohio*,[50] the Pennsylvania high court held that the exclusionary rule applied only to criminal prosecutions, but not to forfeiture proceedings that were civil in nature.[51] The Supreme Court reversed this decision, concluding that the forfeiture proceeding was "quasi-criminal" in character.[52] The Supreme Court emphasized that if the defendant was convicted of any of the possible criminal offenses involved, he would be subject to a fine ranging between $100 and $500, which was far less severe than the civil forfeiture of the driver's vehicle, which was valued at $1000.[53] The Court explained that "it would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible."[54]

While the "quasi-criminal" civil penalties and the criminal penalties were codified in the same statute in *One 1958 Plymouth*,[55] subsequent case law addressed issues regarding civil penalties that were codified independently of criminal statutes. For example, the Supreme Court in *United States v. Ward*,[56] held that the issue of whether a penalty is civil or criminal is a question of "statutory construction."[57] The *Ward* Court held that the judiciary should overrule a legislature's classification of a penalty as civil only when "the statutory scheme . . . [is] so punitive either in purpose or effect as to negate that intention."[58]

c. Application of the Exclusionary Rule to Civil Proceedings other than Forfeiture.—The Supreme Court has chosen not to extend the exclusionary rule to a number of other civil proceedings, including

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49. *See id.*

50. 367 U.S. 643 (1961).

51. *Id.*

52. *Id.* at 700-01.

53. *Id.* at 701.

54. *Id.*

55. *Id.* at 701 n.9 (citing PA. STAT. ANN. tit. 47, § 4-494(a) (West 1964 Supp.)).

56. 448 U.S. 242 (1980).

57. *Id.* at 248.

58. *Id.* at 248-49. The issue in *Ward* was whether a civil penalty of up to $5000 per violation in the Federal Water Pollution Control Act was quasi-criminal, thus invoking Fifth Amendment self-incrimination protections. *See id.* at 244-45.

grand jury proceedings,[59] federal habeas corpus review,[60] tax forfeitures of gambling proceeds,[61] and civil deportation proceedings.[62]

An often cited case regarding the application of the exclusionary rule to civil proceedings is *United States v. Janis*.[63] *Janis* addresses the applicability of the exclusionary rule to a federal civil proceeding utilizing evidence that was obtained by state police in violation of the Fourth Amendment.[64] In *Janis*, Los Angeles police officers obtained a search warrant and conducted a search in an effort to locate bookmaking paraphernalia.[65] They seized $4940 in cash and betting records, and they arrested the defendant.[66] Subsequently, the arresting officer contacted the Internal Revenue Service (IRS) which assessed wagering taxes of $89,026.09 against the defendants after examining the records.[67] The IRS, per federal statute, levied the $4940 as partial satisfaction of the assessment.[68] The district court found that the warrant was based on a defective affidavit and quashed the warrant.[69] The district court ordered all of the respondent's belongings returned except for the cash which had been levied by the IRS.[70] The respondent later filed for a refund with interest because the assessment was based on illegally obtained evidence.[71] The court excluded the evidence and ordered that the IRS refund the amount assessed.[72]

The Supreme Court reversed the decision, holding that application of the exclusionary rule in this instance would not further the purpose of the rule, as state law enforcement officers would likely not

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59. *See* United States v. Calandra, 414 U.S. 338, 354-55 (1974) (holding that a witness before the grand jury could be compelled to answer questions based on evidence obtained from an unlawful search and seizure).

60. *See* Stone v. Powell, 428 U.S. 465, 481-82 (1976) (holding that after the State has provided the opportunity for full and fair litigation of a Fourth Amendment claim, a prisoner need not be granted habeas corpus relief on the grounds that evidence obtained through illegal search and seizure was admitted at trial).

61. *See* United States v. Janis, 428 U.S. 433, 454 (1976) (holding that evidence obtained in violation of the Fourth Amendment is not excluded from a federal civil tax proceeding).

62. *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984) (holding that evidence obtained in connection with peaceful arrests by I.N.S. officers is not excludable in an I.N.S. civil deportation hearing).

63. 428 U.S. 433 (1976).

64. *Id.* at 434.

65. *Id.*

66. *See id.* at 436.

67. *See id.* at 437.

68. *See id.*

69. *Janis*, 428 U.S. at 437-38.

70. *Id.* at 438.

71. *See id.*

72. *Id.* at 438-39.

be deterred by making "concededly relevant and reliable evidence"[73] unavailable to federal authorities.[74] The Court noted that "[i]n the complex and turbulent history of the rule, the Court never has applied . . . [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state."[75] The Court distinguished its application of the exclusionary rule to the civil forfeiture in *One 1958 Plymouth* on the ground that the forfeiture in that case was actually a penalty for a criminal offense.[76]

d. States Vary in Application of the Exclusionary Rule in Civil in rem *Forfeitures.*—Six states, Alabama, Arkansas, Iowa, Nebraska, North Dakota, and Washington, have expressly applied the exclusionary rule to civil *in rem* forfeiture proceedings prior to the Court of Special Appeals holding in *One 1995 Corvette.*[77] The California Court of Appeal, however, was persuaded by the Court of Special Appeals analysis in *One 1995 Corvette* and declined to apply the exclusionary rule to a civil forfeiture proceeding against $241,600 seized by the police.[78] The claimant appealed summary judgment forfeiting $241,600 that was seized from a briefcase in his car.[79] The California Court of Appeal reversed, holding that questions of fact existed regarding claimant's interest in the money, claimant's standing to oppose forfeiture[80] and claimant's knowledge that the money was linked to illegal drugs.[81] The California Court of Appeal distinguished the statute in *One 1958 Plymouth* as combining criminal and civil penalties[82] and found the statute in *One 1995 Corvette* to be analogous to the California statute.[83] The California Court of Appeal held that application of the exclusionary rule to civil *in rem* forfeiture proceedings is "unnecessary and of little additional benefit" noting this was certainly the case when the property was owned by a third-party who had not been convicted.[84] The California Court of Appeal concluded by stating that the Su-

73. *Id.* at 447.
74. *Id.* at 454.
75. *Id.* at 447.
76. *See id.* at 447 n.17.
77. *See infra* note 123.
78. *See* California v. $241,600 United States Currency, 79 Cal. Rptr. 2d 588, 595 (Ct. App. 1998).
79. *Id.* at 589-90. The claimant had denied ownership of the money several times and later filed for return of the money. *See id.* at 590.
80. *Id.* at 594.
81. *Id.* at 596.
82. *Id.* at 594-95.
83. *Id.* at 595.
84. *Id.*

preme Court had refused to apply the exclusionary rule to civil proceedings "and . . . decline[d] to do so . . . in this civil forfeiture case."[85]

3. The Court's Reasoning.—In *One 1995 Corvette*, the Court of Appeals held that the exclusionary rule applies to civil *in rem* forfeiture proceedings.[86] The court explained that *One 1958 Plymouth* is still good law, as the Supreme Court has not expressly overruled it and because a long line of lower court references to the case illustrate its strong precedential value.[87] The court reasoned that because of the continued viability of *One 1958 Plymouth*, it would be inappropriate to overrule the case.[88]

The majority began its opinion by providing an extensive discussion of the *One 1958 Plymouth* decision.[89] The court then addressed the Court of Special Appeals's rejection of the continued validity of *One 1958 Plymouth*.[90] The court had noted that the United States Supreme Court, as recently as 1994, had cited *One 1958 Plymouth* as authority for applying the exclusionary rule to civil forfeiture proceedings.[91] The court then pointed out that eleven of the thirteen United States courts of appeals "have interpreted . . . [*One 1958 Plymouth*] to stand for the proposition that the exclusionary rule applies to civil *in rem* forfeitures."[92] Although the court recognized that many of these cases referred to *One 1958 Plymouth* in dicta only, the majority asserted that these decisions "consistently accept the interpretation of . . . [*One 1958 Plymouth*] as applying the exclusionary rule to civil *in rem* forfeiture proceedings."[93] Therefore, the *One 1995 Corvette* majority refused to "overrule" *One 1958 Plymouth* and concluded that it was the court's "duty to continue to apply *One Plymouth*."[94]

The *One 1995 Corvette* court then addressed the respondent's argument that the forfeiture proceeding at issue in the present case was distinguishable from the forfeiture proceeding in *One 1958 Plymouth*.[95] Rejecting the argument, the court found that the civil *in rem*

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85. *Id.*
86. 353 Md. at 139, 724 A.2d at 692.
87. *Id.* at 121-24 & nn.5-6, 724 A.2d at 684-85 & nn.5-6.
88. *Id.* at 126, 724 A.2d at 686.
89. *See id.* at 118-21, 724 A.2d at 682-83.
90. *Id.* at 121-26, 724 A.2d at 684-86.
91. *Id.* at 122, 724 A.2d at 684 (citing United States v. James Daniel Good Real Property, 510 U.S. 43, 49 (1993)).
92. *Id.* at 123, 724 A.2d at 684 (citations omitted).
93. *Id.* at 124, 724 A.2d at 685.
94. *Id.* at 126, 724 A.2d at 686.
95. *Id.*

forfeiture proceeding in the present case was "quasi-criminal" within the meaning of *Boyd*, *One 1958 Plymouth*, and their progeny.[96] The court first dismissed the suggestion that the application of the exclusionary rule should depend upon whether the forfeiture law is "punitive."[97] Instead, the court explained that because the exclusionary rule was meant to remedy Fourth Amendment violations, the proper consideration was whether the Fourth Amendment applied to civil proceedings such as this one.[98] The court then looked to the language and history of the Fourth Amendment, which indicated no limitation to criminal trials, but instead suggested a broader goal of ensuring "freedom from unreasonable governmental searches and seizures of any kind."[99] The court concluded that "Fourth Amendment protections . . . apply regardless of the criminality of the conduct of the owner of the property or the use to which the property is put."[100]

Next, the court rejected the respondent's assertion that the label "quasi-criminal" is limited to forfeiture proceedings, such as the one in *One 1958 Plymouth*, where the civil penalties could exceed the criminal penalties.[101] The court reasoned that because of the wide range of criminal penalties and property values subject to forfeiture, the respondent's argument "would lead to the absurd situation where the exclusionary rule would or would not be applicable depending upon the value of the item seized."[102] The court also rejected the respondent's argument that the *One 1958 Plymouth* holding was limited to forfeiture statutes that authorize a civil forfeiture only after a criminal conviction and thus did not apply to the present case because, under Maryland's forfeiture statute, criminal charges are irrelevant as to whether a civil forfeiture can be pursued.[103] The court explained that although criminal charges may not be necessary to trigger the Maryland statute, criminal conduct or criminal intent must be proven to subject property to forfeiture.[104]

The court determined, instead, that the more sound interpretation of *One 1958 Plymouth* would label as "quasi-criminal" any forfei-

96. *Id.* at 126-27, 724 A.2d at 686; *see also infra* notes 140-152 and accompanying text.
97. 353 Md. at 127, 724 A.2d at 686.
98. *Id.* at 127-28, 724 A.2d at 687.
99. *Id.* at 130-31, 724 A.2d at 688.
100. *Id.* at 131, 724 A.2d at 689.
101. *Id.*
102. *Id.* at 132 n.9, 724 A.2d at 689 n.9.
103. *Id.* at 133, 724 A.2d at 689.
104. *See id.*, 724 A.2d at 689-90.

ture action based upon "inherently criminal activity,"[105] regardless of whether it was indictable or what the punishment was. Applying this standard to the Maryland forfeiture law at issue, the court concluded that it was "quasi-criminal" in nature "because criminality is at the basic foundation of the conduct from which a forfeiture suit may arise under the . . . statute."[106]

The court also rejected the respondent's contention that *One 1958 Plymouth* covered only forfeiture actions triggered by a criminal conviction and that the Maryland forfeiture statute did not require the commission of a crime.[107] The court again emphasized that although the Maryland statute does not require or create a criminal proceeding, "criminal evidence . . . is typically necessary to prove a forfeiture case under [the Maryland statute]."[108] The majority also suggested that declining to apply the exclusionary rule in these types of cases would allow the government to circumvent the requirement of the Fourth Amendment "by proceeding under the auspices of a civil action that authorizes the taking of private property, but only if that property is used, or intended to be used, for criminally-related purposes."[109]

Finally, the court cited a policy reason for applying the exclusionary rule to "quasi-criminal" cases such as the present case. The court stated that "the need for deterrence [of illegal searches and seizures] exceeds the societal costs" of applying the exclusionary rule.[110] The court indicated that the failure to apply the exclusionary rule in cases such as the present one "could lead to a separate line of police work devoted to forfeitures."[111] Additionally, the court noted that despite its repeated warnings that forfeitures in Maryland are disfavored, governments have "increasingly filed civil forfeiture actions in lieu of criminal charges, knowing that constitutional protections provide greater obstacles to their criminal cases, and that forfeitures have a great financial impact not only on the defendant but on the government's coffers as well."[112] The court concluded, therefore, that the application of the exclusionary rule to civil forfeiture proceedings was

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105. *Id.*, 724 A.2d at 690.
106. *Id.* at 135, 724 A.2d at 690.
107. *Id.* at 135, 724 A.2d at 691.
108. *Id.* at 136, 724 A.2d at 691.
109. *Id.* at 137, 724 A.2d at 691.
110. *Id.* at 138, 724 A.2d at 692.
111. *Id.*
112. *Id.* at 138-39, 724 A.2d at 692 (citing William Patrick Wilson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1328 (1992)).

necessary to deter police from conducting illegal searches and seizures.[113]

4. Analysis.—In *One 1995 Corvette*, the Court of Appeals demonstrated a strong policy against the use of civil forfeiture, holding that the exclusionary rule should be applied to all civil *in rem* forfeiture proceedings.[114] The Court of Appeals's holding is inconsistent with Maryland and federal case law in three respects. First, its interpretation of *One 1958 Plymouth* conflicts with its own subsequent rulings and those of the Supreme Court that have limited the application of the exclusionary rule in civil proceedings. Second, universal application of the exclusionary rule to all civil *in rem* forfeitures is inconsistent with its application in criminal cases, which allows for exceptions. Finally, this interpretation is inconsistent with *One 1958 Plymouth*, which limited the holding to "quasi-criminal" *in rem* forfeiture proceedings. Over the last thirty years, the "quasi-criminal" classification has been replaced by a deference to statutory interpretation—the legislature's intent to declare a penalty civil or criminal.[115] The court should have classified the forfeiture penalty in *One 1995 Corvette* as civil and declined to apply the exclusionary rule.

a. Misinterpreting a Long Line of Cases Citing One 1958 Plymouth.—*One 1995 Corvette*, a case of first impression in Maryland,[116] rests on the interpretation and viability of *One 1958 Plymouth*, a thirty-four year-old case which is the primary Supreme Court precedent on point.[117] The court's principal reason for not distinguishing *One 1958 Plymouth* from the case at bar was the existence of a long line of cases that cited *One 1958 Plymouth* as standing for the application of the exclusionary rule to all civil *in rem* proceedings.[118] This contention contains three significant flaws. First, as the *One 1995 Corvette* court acknowledged, many of these cases are merely persuasive as their cita-

113. *See id.* at 138, 724 A.2d at 692.

114. *Id.* at 139-40, 724 A.2d at 692-93.

115. *See id.* at 82-83, 724 A.2d at 770-71 (summarizing the Court's transition from characterizing civil forfeiture proceedings as "quasi-criminal" to relying on the legislation to identify whether a proceeding is civil or criminal); *see also* U.S. v. Ward 242, 248-49 (1980) (discussing the Court's reliance on express or implied legislative intent to determine whether a proceeding is civil or criminal and stating that the Court "has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction").

116. *See* Mayor of Baltimore v. One 1995 Corvette, 119 Md. App. 691, 721, 706 A.2d 43, 58 (1998) (noting that "[n]o previous Maryland decision has ever squarely addressed this issue").

117. *See One 1995 Corvette*, 353 Md. at 118, 724 A.2d at 682.

118. *Id.* at 122-23 & nn.4-6, 724 A.2d at 684-85 & nn.4-6.

tions to *One 1958 Plymouth* were in dicta.[119] Second, the majority of the cases cited were not on point. Of the thirteen federal cases cited in footnote five of the *One 1995 Corvette* decision, only four were on point.[120] The remaining nine cases included five in which the search was held to be legal[121] and four cases that involved other issues including a tax proceeding and a criminal forfeiture.[122] Of thirty-four state cases cited in footnote six of the *One 1995 Corvette* decision, only six were on point.[123] In nine of the remaining state cases, the search at

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119. *Id.* at 124, 724 A.2d at 685 (noting that "in many of these federal and state cases, the various courts refer to [*One 1958 Plymouth*] primarily in dicta").

120. *See* United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1054 (9th Cir. 1994) (affirming summary judgment against the government in a civil forfeiture action against $191,910 seized in a search for illegal drugs that was conducted without probable cause); United States v. Taylor, 13 F.3d 786, 787 (4th Cir. 1994) (vacating summary judgment in favor of the government in a real property forfeiture proceeding and remanding for evidentiary hearing to determine whether evidence of illegal gambling resulting in the forfeiture was obtained in a legal search); United States v. $639,558 in U.S. Currency, 955 F.2d 712, 721 (D.C. Cir. 1992) (affirming the dismissal of a civil forfeiture action against cocaine-laced money obtained in a warrantless search); United States v. South Half of Lot 7 & Lot 8, 876 F.2d 1362, 1370 (8th Cir.) (dismissing 13 civil forfeiture proceedings against real property that was seized without probable cause), *vacated and reh'g granted*, 883 F.2d 53 (1989), *rev'd on other grounds*, 910 F.2d 448 (8th Cir. 1990).

121. The search at issue was found to be legal in five of the cited cases and therefore the applicability of the exclusionary rule was not in debate. *See* United States v. 500 Delaware Street, 113 F.3d 310, 313 (2d Cir. 1997); United States v. One Lot of United States Currency, 103 F.3d 1048, 1053 (1st Cir. 1997); United States v. 9844 South Titan Court, 75 F.3d 1470, 1492 (10th Cir. 1996); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1303 (5th Cir. 1983); and United States v. 1988 BMW 750IL, 716 F. Supp. 171, 176 (E.D. Pa. 1989).

122. *See* Becker v. IRS, 34 F.3d 398, 400 (7th Cir. 1994) (concerning an action for declaratory and injunctive relief under the Freedom of Information Act and Privacy Act against the IRS); Wolf v. Commissioner, 13 F.3d 189, 191 (5th Cir. 1993) (holding the exclusionary rule was not applicable to the tax proceedings at bar); United States v. Elgersma, 929 F.2d 1538, 1548 (holding that the exclusionary rule applied as the penalty at issue was criminal), *vacated and reh'g granted*, 938 F.2d 179 (11th Cir. 1991), *aff'd on other grounds*, 971 F.2d 690 (11th Cir. 1992); United States v. 92 Buena Vista Ave., 738 F. Supp. 854, 857 (D.N.J. 1990) (holding that testimony stemming from evidence obtained in an illegal search is admissible in a civil forfeiture proceeding as long as probable cause for forfeiture is established through independent evidence).

123. *See* Berryhill v. State, 372 So. 2d 355, 355 (Ala. Civ. App. 1979) (reversing the judgment of forfeiture against alcohol in a dry county because the search was illegal); Kaiser v. State, 752 S.W.2d 271, 274 (Ark. 1988) (remanding the civil forfeiture of a pistol and ten thousand dollars because the State did not prove the reliability of the telephone tip that precipitated the search); *In re* Flowers, 474 N.W.2d 546, 547 (Iowa 1991) (reversing the civil forfeiture of $1982 seized in an illegal search); State v. One 1987 Toyota Pickup, 447 N.W.2d 243, 249 (Neb. 1989) (reversing a criminal forfeiture of a truck seized in an illegal search); State v. One 1990 Chevrolet Pickup, 523 N.W.2d 389, 394-95 (N.D. 1994) (remanding forfeiture proceeding against a pickup truck to determine whether probable cause for the seizure existed); Deeter v. Smith, 721 P.2d 519, 520 (Wash. 1986) (holding that an automobile forfeiture under the Washington State Uniform Controlled Substances

issue was held to be legal.[124] Five cases involved administrative hearings.[125] The remaining fourteen proceedings were merely courts' anecdotal comments regarding civil *in rem* forfeitures based on illegal searches.[126] Thus, their persuasive value is minimal.

Act is quasi-criminal and therefore reversing a forfeiture that was based on an illegal search).

124. *See* Idaho Dep't of Law Enforcement v. $34,000 U.S. Currency, 824 P.2d 142, 147 (Idaho Ct. App. 1991); People *ex rel.* Waller v. Seeburg Slot Machs., 641 N.E.2d 997, 1004 (Ill. App. Ct. 1994); Caudill v. State, 613 N.E.2d 433, 440 (Ind. Ct. App. 1993); Boston Housing Auth. v. Guirola, 575 N.E. 2d 1100, 1105 (Mass. 1991); *In re* Forfeiture of $176,598, 505 N.W.2d 201, 206 (Mich. 1993); A 1983 Volkswagen v. County of Washoe, 699 P.2d 108, 109 (Nev. 1985) (per curiam); *In re* $207,523.46 in U.S. Currency, 536 A.2d 1270, 1272 (N.H. 1987); *In re* One 1967 Peterbilt Tractor, 506 P.2d 1199, 1202 (N.M. 1973); Pitts v. State, 428 S.E.2d 650, 652 (Ga. App. 1993).

125. Powell v. Secretary of State, 614 A.2d 1303, 1304 (Me. 1992) (administrative driver's license suspension proceeding); *In re* Finn's Liquor Shop, Inc. v. State Liquor Auth., 249 N.E.2d 440, 442 (N.Y. 1969) (liquor license proceeding); Loyal Order of Moose Lodge 1044 v. Ohio Liquor Control Comm'n, 663 N.E.2d 1306, 1306 (Ohio 1995) (liquor permit hearing); Board of License Comm'rs v. Pastore, 463 A.2d 161, 162 (R.I. 1983) (liquor license hearing); Commonwealth v. E.A. Clore Sons, Inc., 281 S.E.2d 901, 902 (Va. 1981) (State Department of Labor proceeding).

126. These proceedings range from an involuntary conservatorship to one regarding state seizure of livestock based on allegations of animal cruelty. *See* Wohlstrom v. Buchanan, 884 P.2d 687, 693 (Ariz. 1994) (reversing a civil forfeiture of $125,000 that was based on an unconstitutional state law requiring the claimant to indicate his interest in and method of acquiring the property under penalty of perjury); Conservatorship of Susan T., 884 P.2d 988, 997 (Cal. 1994) (in bank) (holding that the exclusionary rule does not apply to involuntary conservatorship proceedings); People v. Lot 23, 707 P.2d 1001, 1004-05 (Colo. App. 1985) (holding certain items seized in an otherwise legal search were not subject to forfeiture because no nexus to crime was established); *In re* One 1987 Toyota, 621 A.2d 796, 800 (Del. Super. Ct. 1992) (resting on a question of fact as to whether the vehicle was used to transport illegal drugs); District of Columbia v. Ray, 305 A.2d 531, 534 (D.C. 1973) (determining that a libel claim based on an illegal search did not preclude civil forfeiture); State Dep't of Highway Safety & Motor Vehicles v. Killen, 667 So. 2d 433, 436-37 (Fla. Dist. Ct. App. 1996) (dismissing a Fourth Amendment illegal search claim because claimant did not file a timely objection); State v. Davis, 375 So. 2d 69, 75 (La. 1979) (holding that the exclusionary rule does not apply in a probation hearing unless the search was conducted in bad faith); State *ex rel.* Fuhr v. Carrier, 765 S.W.2d 671, 672 (Mo. Ct. App. 1989) (holding a forfeiture invalid because the arresting officer was not the one who seized the vehicle); State v. Seven Thousand Dollars, 642 A.2d 967, 975 (N.J. 1994) (holding that money discovered in the search of a vehicle was not subject to forfeiture because no connection with illegal activity was established); State *ex rel.* State Forester v. Umpqua River Navigation Co., 478 P.2d 631, 637 (Or. 1970) (holding that the exclusionary rule does not apply in a civil forfeiture proceeding to evidence obtained by individuals who were not law enforcement officers); *In re* Investigating Grand Jury, 437 A.2d 1128, 1129 (Pa. 1981) (involving a motion for a protective order to bar disclosure of grand jury evidence); State v. Western Capital Corp., 290 N.W.2d 467, 469 (S.D. 1980) (holding rested on statutes governing contracts and deceptive trade practices); Pine v. State, 921 S.W.2d 866, 874 (Tex. App. 1996) (finding that the State was not precluded from pursuing the forfeiture of livestock based on charges of animal cruelty even if the initial seizure was illegal); Sims v. Utah State Tax Comm'n, 841 P.2d 6, 14-15 (Utah 1992) (reversing judg-

The third flaw is that one case cited actually refuted the court's argument. In *State v. Western Capital Corp.*,[127] the Supreme Court of South Dakota cited *One 1958 Plymouth*, *Boyd*, and other cases as supporting the use of the exclusionary rule when penalties are criminal but not when the purpose of the statute is remedial.[128] The court distinguished *Boyd* by explaining that civil and criminal penalties were contained in a single statute in *Boyd*, while civil and criminal penalties were codified separately in subsequent Supreme Court cases.[129] The court stated that in these subsequent cases, which are analogous to *One 1995 Corvette*, the Supreme Court has deferred to the legislature's intent that the forfeiture be regarded as civil in nature.[130] Under this analysis, the exclusionary rule would apply to illegally obtained evidence in proceedings involving criminal penalties but not in proceedings that threaten only civil penalties.

b. The Courts' Refusal to Extend the Exclusionary Rule to Civil Cases.—As the Court of Special Appeals's decision in *One 1995 Corvette* illustrated, neither the Court of Appeals nor the Supreme Court has applied the exclusionary rule to civil proceedings subsequent to *One 1958 Plymouth*.[131] The lower court also persuasively argued that application of the exclusionary rule to civil forfeiture proceedings based on *One 1958 Plymouth* conflicts with a long line of subsequent precedent in which the Supreme Court, as well as the Court of Appeals, has declined to apply the exclusionary rule to various civil proceedings.[132]

Indeed, the Supreme Court has, subsequent to *One 1958 Plymouth*, ruled that an illegal search would not be suppressed via the exclusionary rule in state grand jury proceedings,[133] in a federal habeas

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ment and vacating the Utah Illegal Drug Stamp tax assessed on marijuana and cocaine seized in an illegal search).

127. 290 N.W.2d 467 (S.D. 1980).

128. *Id.* at 472 (citations omitted).

129. *Id.*

130. *Id.*

131. *See* Mayor of Baltimore v. One 1995 Corvette, 119 Md. App. 691, 721, 766-68, 706 A.2d 43, 58, 80-81, *rev'd*, *One 1995 Corvette*, 353 Md. 114, 724 A.2d 680.

132. *See id.* at 722-23 n.12, 706 A.2d at 58-59 n.12. In the Court of Special Appeals's majority opinion, Judge Moylan stated that to interpret *One 1958 Plymouth* as holding that the exclusionary rule should be universally applied to all civil forfeitures would be "freakishly aberrational" in view of the other circumstances in which the rule did not apply and "inconsistent with what is now the long prevailing Supreme Court attitude." *Id.*

133. *See* United States v. Calandra, 414 U.S. 338, 354-55 (1974) (compelling a witness before the grand jury to answer questions based on evidence obtained from an unlawful search and seizure).

corpus review,[134] in a dispute for the return of funds seized by the IRS as part of a tax assessment,[135] or in a deportation hearing.[136] Also, the Court of Appeals of Maryland has applied the exclusionary rule in such contexts as a sentencing hearing,[137] in a contempt hearing regarding the violation of an earlier injunction,[138] in a hearing to revoke probation,[139] and in an administrative hearing to terminate the employment of an adjunct member of a county sheriff's department.[140]

As shown by the variety of proceedings in which the exclusionary rule has not been applied, application of the exclusionary rule in forfeiture proceedings would, indeed, seem "freakishly aberrational."[141] Moreover, inconsistent application of the exclusionary rule to civil proceedings will minimize any incremental deterrence of illegal searches and seizures. If the court is correct that police conduct illegal searches and seizures because they believe that the evidence can be used in forfeiture proceedings, then the illegal searches and seizures will continue in pursuit of the civil penalties listed above, regardless of the application of the exclusionary rule in *in rem* forfeitures.

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134. *See* Stone v. Powell, 428 U.S. 465, 481-82 (1976) (holding that after a Fourth Amendment claim has been litigated, a prisoner can not be granted habeas corpus relief on the grounds that evidence obtained through an illegal search and seizure was admitted at trial).

135. *See* United States v. Janis, 428 U.S. 433, 454 (1976) (holding that evidence obtained in violation of the Fourth Amendment in a good faith effort by state police is not excluded in a federal civil tax proceeding when the federal government can prove no participation in the illegal search).

136. *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984) (holding that in a civil deportation hearing, the exclusionary rule does not apply to an admission of status as an illegal alien obtained after an illegal arrest).

137. *See* Logan v. State, 289 Md. 460, 486, 425 A.2d 632, 645 (1981) (finding that the exclusionary rule "does not extend to the sentencing stage of a criminal cause").

138. *See* Whitaker v. Prince George's County, 307 Md. 368, 383, 514 A.2d 4, 12 (1986) (refusing to apply the exclusionary rule to illegally obtained evidence offered to support an injunction against operating prostitution related activities because "no deterrent effect could be anticipated by applying the rule to [such] proceedings").

139. *See* Chase v. State, 309 Md. 224, 249, 522 A.2d 1348, 1360 (1987) (asserting that the Supreme Court's "evaluation and rejection of the application of the [exclusionary] rule to proceedings other than the criminal trial . . . leads to the logical conclusion that . . . the rule would not generally apply to [civil parole revocation proceedings]").

140. *See* Sheetz v. Mayor of Baltimore, 315 Md. 208, 214, 553 A.2d 1281, 1284 (1989) (holding that the exclusionary rule does not apply to illegally obtained evidence in discharge proceeding against police officer because the "deterrent benefits" would be minimal).

141. *See supra* note 107.

c. Criminal Exceptions to the Exclusionary Rule.—Further support for not applying the exclusionary rule to every civil *in rem* forfeiture case lies in the original application of the rule to criminal cases. As the Court of Special Appeals correctly noted, the exclusionary rule does not apply universally to all criminal proceedings. Exceptions include the good faith exception[142] and the exception for impeachment of the defendant.[143] In both of these situations, the Supreme Court found that the application of the exclusionary rule would not deter officers from illegal searches and seizures. For example, in examining arguments against the good faith exception in *United States v. Leon*, the Court dismissed as speculation the contention that officers would more carefully scrutinize warrant affidavits if the exclusionary rule applied when a warrant was defective due to judicial error.[144] The Court concluded that, in general, the high cost of excluding evidence outweighed the minimal incremental deterrent effect of applying the exclusionary rule and a case-by-case analysis should be performed to determine if application of the rule is appropriate in each particular case.[145] The Court of Special Appeals illustrated that the exclusionary rule is not applied universally to all criminal proceedings.[146] The Court of Appeals did not acknowledge these exceptions, choosing instead to focus on the importance of the exclusionary rule and on its application.[147] While the Supreme Court has advocated a case-by-case approach for applying the exclusionary rule in criminal cases, the Court of Appeals stated that the exclusionary rule should be applied to all "civil drug related forfeiture cases."[148] Unlike the Court of Special Appeals, the Court of Appeals did not weigh the societal cost of

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142. *See* Massachusetts v. Sheppard, 468 U.S. 981, 990-91 (1984) (holding that the exclusionary rule does not apply in a murder conviction in which officers reasonably relied upon a warrant which was defective because of errors made by the magistrate issuing the warrant); United States v. Leon, 468 U.S. 897, 926 (1984) (holding that the exclusionary rule does not universally apply to evidence obtained in an illegal search when officers reasonably relied on a warrant which was later found to be invalid).

143. *See* United States v. Havens, 446 U.S. 620, 628 (1980) (holding that the exclusionary rule does not apply to illegally obtained evidence that is used to impeach the defendant).

144. *Leon*, 468 U.S. at 918.

145. *Id.* at 922.

146. *See One 1995 Corvette*, 119 Md. App. at 710-15, 706 A.2d at 54-55 (examining exceptions to the exclusionary rule such as: identification of witnesses through illegal searches, impeachment, and the good faith exceptions).

147. *One 1995 Corvette*, 353 Md. at 127-33, 724 A.2d at 686-89.

148. *Id.* at 138, 724 A.2d at 692 ("[I]n a civil drug-related forfeiture case, the need for deterrence exceeds the social cost. Without the application of the exclusionary rule to section 297 forfeiture actions, officers could seize contraband, absent sufficient probable cause to do so, even in a criminal context to prove the wrongdoer's criminality.")

foregoing a forfeiture solely because the search was tainted.[149] This blanket application of the exclusionary rule creates a higher standard for civil forfeiture of property than the *Leon* standard for criminal proceedings.[150]

d. The Plain Text of One 1958 Plymouth.—Equally important is the content of the actual opinion in *One 1958 Plymouth.* Perhaps most significantly, the Supreme Court in *One 1958 Plymouth* confined its decision to the specific type of forfeiture at issue in that case.[151] The Court framed the issue as whether the exclusionary rule applied to "forfeiture proceedings *of the character involved here.*"[152] The Court also stated that the exclusionary rule applied to "such forfeiture proceedings."[153] The Court narrowed the application of the exclusionary rule to a subset of forfeitures a third time in summarizing its reasoning:

> In sum, we conclude that the nature of a forfeiture proceeding, so well described by Mr. Justice Bradley in *Boyd,* and the reasons which led the Court to hold that the exclusionary rule of *Weeks v. United States,* is obligatory upon the States under the Fourteenth Amendment, so well articulated by Mr. Justice Clark in *Mapp,* support the conclusion that the exclusionary rule is applicable to forfeiture proceedings *such as the one involved here.*[154]

Narrowing language in the statement of the issue, the holding, and the conclusion casts doubt upon the argument that the Supreme Court intended that the exclusionary rule apply to civil forfeitures of a different type than the one at issue in that case. A single instance of limiting language may be dismissed as unintentional; however, three instances cannot be ignored. The language narrows the opinion to cases in which penalties originally characterized as civil are considered criminal in nature.[155] Civil penalties that are included in criminal statutes and that are more severe than the criminal penalty fall into

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149. *Id.* at 137-38 (focusing cost benefit analysis on whether or not the exclusionary rule would deter police from conducting illegal searches).

150. *See supra* notes 134-135 and accompanying text (discussing *Leon*).

151. *See One 1995 Corvette,* 119 Md. App. 691, 764-65, 706 A.2d 43, 79-80 (noting that the *One 1958 Plymouth* court engaged in "a very fact-specific and *ad hoc* analysis," placing particular emphasis on the severity of the respective criminal and civil penalties involved).

152. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965) (emphasis added).

153. *Id.*

154. *Id.* at 702 (emphasis added).

155. *See id.* at 701 (distinguishing the case as relating to a civil forfeiture for violating a criminal law that is more punitive than the criminal penalty).

this category and are the sole focus of *One 1958 Plymouth*.[156] Also, this interpretation is further supported by the Supreme Court's subsequent refusal to extend the exclusionary rule to other types of civil proceedings.[157]

e. Civil versus Quasi-Criminal Penalties.—Despite the Court of Appeals's reluctance to do so, *One 1995 Corvette* can be distinguished from *One 1958 Plymouth* based on the fact that *One 1995 Corvette* did not involve civil penalties that were more severe than the criminal penalties.[158] Under the possible civil penalties, the defendant in *One 1995 Corvette* could have lost his automobile while under criminal penalties, he could have been sentenced to twenty years in prison, five years without parole, and $25,000 in fines.[159] The Court of Appeals found this interpretation untenable as it focused on the value of the items rather than on the nature of the forfeiture statute.[160] The court's analysis overlooks the fact that courts routinely utilize discretion in determining whether a civil penalty is so severe as to render it criminal.[161] In addition, although the range in value of automobiles has vastly increased over the last thirty years, courts are certainly capable of looking beyond the mere value of the item and weighing the effect of the respective civil and criminal penalties.

Also, as the Supreme Court noted in *United States v. Ward*,[162] a court should disregard a legislative label of a penalty as civil only when the "clearest proof" indicates that the statutory scheme was "so punitive either in purpose or effect as to negate that [legislative] intention."[163] Additionally, in cases where the civil and criminal penalties are codified separately and the civil penalties are not deemed to be so severe as to become criminal, the Supreme Court defers to legislative intent. For example, in *One Lot Emerald Cut Stones v. United States*, a

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156. *See id.*

157. *See supra* notes 54-57 and accompanying text (referring to cases in which the Supreme Court has refused to apply the exclusionary rule to civil proceedings).

158. *See One 1995 Corvette*, 119 Md. App. at 764-65, 706 A.2d at 79-80. The Court of Special Appeals distinguished *One 1995 Corvette* from *One 1958 Plymouth* by explaining that "the anomaly" between the sanctions that the Supreme Court found significant in *One 1958 Plymouth* were not remotely present in this case. *Id.* at 764, 706 A.2d at 79.

159. *Id.*

160. *See One 1995 Corvette*, 353 Md. at 132 n.9, 724 A.2d at 689 n.9. According to the court, identical searches of a Rolls Royce and an inexpensive 20-year old vehicle would result in different applications of the exclusionary rule under the approach advocated by the lower court: the illegally uncovered evidence would be excluded in the case of the Rolls Royce and admissible against the owner of the inexpensive vehicle. *Id.*

161. *See supra* note 115 and accompanying text.

162. 448 U.S. 242 (1980).

163. *Id.* at 248-49 (citing Flemming v. Nestor, 363 U.S. 603, 617-21 (1960)).

jewelry dealer who was acquitted of smuggling charges moved to bar civil sanctions on the grounds of double jeopardy.[164] The Supreme Court in *One Emerald* held that the issue of civil versus criminal was "one of statutory construction."[165] The Court emphasized that the civil and criminal sanctions were contained in different sections of the code which both distinguished the penalties and showed a clear intention to provide for both.[166] The Court thus found "no reason for frustrating that design."[167] *One 1995 Corvette* is analogous. A criminal conviction is irrelevant when filing a forfeiture action under the Maryland forfeiture statute.[168] As the Court of Special Appeals pointed out, the criminal and civil penalties with which Mr. Holmes could have been charged evolved from distinct statutes which were enacted sixteen years apart.[169] This is distinguishable from both *Boyd*, in which the civil and criminal penalties were contained in the same statute[170] and *One 1958 Plymouth*, in which the civil forfeiture could be filed only after a criminal conviction was obtained.[171]

f. The Court of Appeals Underlying Policy Against Forfeiture Legislation.—The Court of Appeals in *One 1995 Corvette* revealed its true purpose for ruling as it did at the end of the opinion—to further the court's policy against government forfeitures to deter police misconduct.[172] However, it is unlikely that this decision will further this policy goal to the extent that the court appears to believe it will. First, the court's argument that "the need for deterrence [of illegal searches and seizures] exceeds the societal costs" of applying the exclusionary rule in civil forfeiture proceedings[173] ignores the extensive list of civil proceedings in which the exclusionary rule does not apply. This in-

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164. 409 U.S. 232 (1972).

165. *Id.* at 237.

166. *Id.* at 236-37.

167. *Id.*

168. MD. ANN. CODE art. 27, § 297(i) (describing the standards for seizing and forfeiting).

169. Mayor of Baltimore v. One 1995 Corvette, 119 Md. App. 691, 804-06, 706 A.2d 43, 98-100.

170. *See Boyd*, 116 U.S. at 634 (listing the criminal penalties including a fine, imprisonment, and forfeiture, and discussing how the prosecutor could forego the indictment and proceed with a civil forfeiture action).

171. *See One 1958 Plymouth*, 380 U.S. at 694 n.2 (quoting the statute that terminated property rights in vehicles used to illegally transport alcohol).

172. *See One 1995 Corvette*, 353 Md. at 138-39, 724 A.2d at 692 (noting that in Maryland "forfeitures are disfavored . . . because they are considered harsh extractions, odious, and to be avoided where possible" (internal quotation marks omitted) (quoting Frederick City Police Dep't v. One 1998 Toyota Pick-Up Truck, 334 Md. 359, 375, 639 A.2d 641, 649 (1994))).

173. *Id.* at 138, 724 A.2d at 692.

consistent application of the exclusionary rule in civil proceedings is likely to cause confusion rather than to deter misconduct. Also, the court's concern that not applying the exclusionary rule to civil *in rem* forfeitures "could lead to a separate line of police work devoted to forfeiture"[174] overlooks the purpose of police work. Seizing items for use in future undercover work does not reduce the number of criminals on the street. To argue that the police would, on a grand scale, conduct illegal searches and seizures to obtain items to be used in undercover operations assumes continued employment rather than the conviction of criminals as the fundamental goal of the police. An illegal search that results in the seizure of an automobile does not incarcerate the alleged criminals. Certainly, the court has cause to be concerned that civil forfeiture statutes may provide a way for the Government to inflict a civil penalty against a suspect when the probable cause requirement for a search is not met. The Government, however, must still meet the civil burden. If a party can show that the Government purposefully sought to seize property unlawfully, the appropriate legal remedy is a civil suit against the offending officers.[175]

5. Conclusion.—In *One 1995 Corvette,* the Court of Appeals, caught in the vice grip of stare decisis, held that the exclusionary rule applied to civil *in rem* forfeiture proceedings in Maryland based on the continued viability of the one precedent, *One 1958 Plymouth Sedan v. Pennsylvania.*[176] Although the Supreme Court has not expressly overruled *One 1958 Plymouth,* state courts should still be able to distinguish the case and should not fall victim to convenient and mistaken interpretations repeated often throughout the years. The Court of Appeals's contention that the Supreme Court in *One 1958 Plymouth* classified all civil *in rem* forfeitures as "quasi-criminal" ignored the subsequent evolution of the law on when a "civil" penalty should be considered criminal. Both the Supreme Court and the Court of Appeals have refused to extend the exclusionary rule to civil proceedings for the thirty-four years since *One 1958 Plymouth.* As a result of this holding, the exclusionary rule is applied to civil *in rem* forfeitures but not to any other civil proceeding. This inconsistent application of the

174. *Id.*

175. United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 451 (1st Cir. 1980) (dismissing the dissent's proposal that this warrantless search should preclude forfeiture as this would unduly prevent the Government from a valid forfeiture when a more successful deterrent, a damage remedy, is available).

176. *See One 1995 Corvette,* 353 Md. at 126, 724 A.2d at 686.

rule will promote neither the court's underlying goal nor the purpose of the rule—the deterrence of illegal searches and seizures.

CAROLE A. MARTENS

B. A Dereliction of Duty by the Court of Appeals of Maryland in Failing to Recognize the Mistake of Fact Defense as a Necessary Component to Guaranteeing a Defendant's Constitutional Due Process Rights

In *Owens v. State*,[1] the Court of Appeals examined whether state and federal due process rights require that a defendant charged with statutory rape be allowed to argue, as a defense, that he reasonably believed the victim to be above the age of consent.[2] The court held that a refusal to allow an affirmative defense of mistake of age to a statutory rape charge did not violate the defendant's constitutional rights to due process.[3] In addressing the due process claims, the court reasoned that "within certain constitutional limits, states may 'create strict criminal liabilities by defining criminal offenses without any element of scienter.'"[4] In so stating, the court demonstrated the contradiction within its decision: the right to due process not only provides this defining "constitutional limit" to legislative authority, but it also personifies the concept that "privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof."[5] By failing to recognize a mistake of fact defense to statutory rape, the court neglected its constitutional duty to ensure that defendants are accorded their essential due process rights.

1. The Case.—On April 11, 1997, a police officer on a routine nighttime patrol discovered a parked car in a public park in Baltimore County several hours after the park had closed.[6] As the officer approached the vehicle, he observed two people within: Timothy Owens

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1. 352 Md. 663, 724 A.2d 43 (1999).

2. *Id.* at 674, 724 A.2d at 48. In Maryland, the age of consent is set at fourteen years of age. *See* MD. ANN. CODE art. 27, § 463(a)(3) (1996).

3. *Owens*, 352 Md. at 667, 742 A.2d at 45. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in part, that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Article 24 of Maryland's Declaration of Rights provides that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." MD. CONST. DECL. OF RIGHTS art. 24.

4. *Owens*, 352 Md. at 672, 742 A.2d at 47 (quoting Smith v. California, 361 U.S. 147, 150 (1959)).

5. *See* Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (holding that the presence of the defendant in a prosecution for a felony is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence).

6. *See* Record Extract at 13, Owens v. State, 352 Md. 663, 724 A.2d 43 (1999) (No. 129).

in the rear seat, shirtless and in the process of putting on his pants, and Ariel Johnson in the passenger's side putting on her pants.[7]

When the officer asked for identification from the occupants, Timothy Owens produced his driver's license which identified him and indicated that his date of birth was April 27, 1978.[8] Having no identification with her, Johnson gave the officer her name and stated that she was sixteen.[9] When asked for her date of birth, she hesitated[10] and stated that her birthday was October 16, 1981.[11] When the officer asked again for her age, and she again replied "sixteen."[12] The officer then asked Miss Johnson how she could be sixteen if she was indeed born in October 1981. Johnson did not respond.[13] After obtaining the telephone number for Johnson's residence, the officer contacted the residence and learned that her date of birth was actually October 16, 1983, making her thirteen years old at the time of the incident.[14]

The officer then asked Miss Johnson to step out of the car to speak with him.[15] As she stepped out of the car, the officer observed a latex condom fall on the ground next to the vehicle.[16] The condom was tested by the Maryland State Police, and it was found to contain sperm, which Mr. Owens stipulated was his.[17]

Timothy Owens was subsequently charged with second degree rape in violation of section 463(a) of the Maryland Annotated Code and was tried on August 27, 1997, in the Circuit Court for Baltimore County.[18] Owens "proceed[ed] by way of a not guilty" and agreed to the statement of facts, which the prosecutor read into the record.[19] At that point, the defense filed a motion to dismiss, arguing that section 463 was unconstitutional because it violated Owens's due process

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7. *See id.* at 14.
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.* at 15. Johnson initially gave the officer a false telephone number and only presented the officer with her true home telephone number after the officer attempted to call the false one. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.* at 4. Section 463(a) provides, in part, that "[a] person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person . . . . [w]ho is under 14 years of age and the person performing the act is at least four years older than the victim." MD. ANN. CODE art. 27, § 463(a).
19. *See Owens*, 352 Md. at 667, 724 A.2d at 45.

rights under both the United States Constitution and the Maryland Declaration of Rights.[20] The defense's argument had the following two bases: (a) the victim was unconstitutionally precluded from testifying that she lied in telling Owens that she was sixteen years old; and (b) the defense of reasonable mistake of fact was necessary to avoid unconstitutional irrebuttable presumptions and to comport with due process.[21] The trial judge denied the motion, concluding that mistake of age could only be used as a mitigating factor in determining sentencing.[22] Owens was found guilty of second degree rape and was sentenced to "eighteen months imprisonment with all but the time served (12 days) suspended, eighteen months probation, . . . [and was] ordered to register as a child sex offender and to submit to DNA testing."[23] Owens appealed to the Court of Special Appeals, but, prior to review by that court, the Court of Appeals granted certiorari on its own motion.[24]

2. *Legal Background.*—

a. Strict Liability Crimes in General.—Under common law, a defendant can argue that he possessed "an honest and reasonable belief in the existence of circumstances that, if true, would make the act for which the person was indicted an innocent act."[25] The notion that an injurious act can amount to a crime only when inflicted intentionally is not a "provincial or transient" one.[26] The common law rule that some mens rea is required for a crime is "firmly embedded" in our justice system.[27] Indeed, the Supreme Court has explicitly stated that

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20. *See id.*

21. *See* Record Extract at 15-23; *Owens*, 352 Md. at 667, 724 A.2d at 45.

22. *See Owens*, 352 Md. at 667-68, 728 A.2d at 45.

23. *See id.* at 668, 728 A.2d at 45.

24. *See id.*

25. Perez v. State, 803 P.2d 249, 250 (N.M. 1990) (citing State v. Gonzales, 99 N.M. 734, *cert. denied*, 99 N.M. 644, *cert. denied*, 464 U.S. 855 (1983)) (stating, in addition, that if there is evidence that at the time of the commission of the alleged offense, defendant entertained a belief of fact that if true would make his conduct lawful, the defendant is entitled to instruction on mistake of fact).

26. Morissette v. United States, 342 U.S. 246, 250-52 (1952) (stating that as states codified common law crimes in early American history, "even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation").

27. Staples v. United States, 511 U.S. 600, 605 (1994) (observing that "the requirement of some *mens rea* for a crime is firmly embedded" in the common law, and that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence" (internal quotation marks omitted) (alteration in original) (quoting United States v. United States Gypsum Co., 438 U.S. 422, 436 (1978))).

"offenses that require no *mens rea* generally are disfavored."[28] Strict liability crimes, therefore, are recognized exceptions to the general rule that mens rea is required for criminal prosecution.[29]

There exist two classes of strict liability crimes: "public welfare" offenses and "lesser legal wrong" offenses.[30] Public welfare offenses include violations of traffic regulations and motor vehicle laws, and sales of misbranded articles.[31] As the Court of Appeals noted in *Dawkins v. State*,[32] "the penalty [for public welfare offenses] . . . is so slight that the courts can afford to disregard the individual in protecting the social interest."[33] This "disregard for the individual" is digestible only because the asserted purpose of public welfare penalties is to regulate, rather than to punish or to correct behavior.[34]

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28. *Id.* at 606 (citing Liparota v. United States, 471 U.S. 419, 426 (1985)); *see also Morissette*, 342 U.S. at 271-73 (concluding that a statute making it a crime to embezzle, steal, purloin, or knowingly convert government property had been wrongly construed as not requiring proof of intent).

29. *See Morissette*, 342 U.S. at 255 (discussing the development of crimes with no mental element in America as grounded in offenses that involve "neglect where the law requires care or inaction where . . . [the law] imposed a duty").

30. *See* Garnett v. State, 332 Md. 571, 599-600, 632 A.2d 797, 811 (1993) (Bell, C.J., dissenting) (discussing the evolution of statutory criminal law and the two classes of strict liability crimes that have emerged: public welfare offenses and "lesser legal wrong" or "moral offenses" and referencing the Supreme Court's discussion of strict liability crimes in *Morissette v. United States*, 342 U.S. 246, 255-56 (1952)).

31. *See* Dawkins v. State, 313 Md. 638, 644-45, 547 A.2d 1041, 1044 (1988) (noting the expansion of the doctrine from cases involving liquor and adulterated milk to include "violations of traffic regulations and motor vehicle laws, sales of misbranded articles and sales or purchases in violation of anti-narcotics laws" (citing Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73 (1933)); *see also* Garnett v. State, 332 Md. 571, 578, 632 A.2d 797, 800 (1993) (discussing the evolution of strict liability statutes after the Industrial Revolution in response to the demands of public health and welfare arising from the new complexities of society); Richard G. Singer, *The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 389 (1989) (stating that in the case of public welfare offenses, strict liability is justified for the following reasons: (1) to "deter profit-driven manufacturers . . . from ignoring the well-being of the consuming public"; (2) an inquiry into mens rea in the case of minor infractions would exhaust the resources of the courts; (3) "the imposition of strict liability is not inconsistent with the moral underpinnings of the criminal law . . . because the penalties are small" and carry no stigma; and (4) the legislature is constitutionally empowered to create strict liability crimes for public welfare offenses).

32. 313 Md. 638, 547 A.2d 1041.

33. *Id.* at 644, 547 A.2d at 1044 (internal quotation marks omitted) (quoting Sayre, *supra* note 31, at 70).

34. *See id.* at 644-45, 547 A.2d at 1044-45; *see also* People v. Vogel, 299 P.2d 850, 852 (Cal. 1956) (reversing a conviction for bigamy and concluding that "if a bonafide and reasonable belief that facts existed which left him free to remarry" the defendant cannot be guilty of the crime of bigamy).

The "lesser legal wrong" theory of strict liability focuses on the defendant's intent to commit a related crime.[35] Because the defendant actually intended to do some legal or moral wrong, the defendant is guilty not only of the crime intended but also of a greater crime for which he may not have the requisite mental state.[36] Take for example, in jurisdictions where extra-marital sex (adultery) is a crime; if a man had an affair with a women under the age of consent, in addition to his clear guilt for the lesser legal wrong of adultery, the man would also be guilty of the greater crime of statutory rape, regardless of his intent—his knowledge of the girl's age. Intent for the greater crime is inferred from the intent to commit a smaller crime.[37]

b. Statutory Rape as a Strict Liability Crime.—In the United States, the majority rule is that "a defendant's knowledge of the age of a victim is not an essential element of statutory rape."[38] The only inquiry under this rule is whether a defendant had sexual intercourse with a statutorily prohibited person.[39]

Indeed, no court had ever permitted a defendant's mistaken belief as to the age of a victim to be a defense to statutory rape until the California Supreme Court in *People v. Hernandez*[40] in 1964.[41] The *Hernandez* court held that, in the absence of a legislative directive otherwise, a charge of statutory rape is defensible where a criminal intent is lacking.[42] The court's decision was based almost entirely on "primor-

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35. *See* Garnett v. State, 332 Md. 571, 601, 632 A.2d 797, 601 (1993) (Bell, J., dissenting) (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 47, at 360 (1986)).

36. *See id.*

37. *See id.*

38. Colin Campbell, Annotation, *Mistake or Lack of Information as to Victim's Age as Defense to Statutory Rape*, 46 A.L.R. 5th 499, 499, § 2[a], at 508 (1997) (noting that a "majority of jurisdictions whose higher courts have considered the issue [of statutory rape] have declined to . . . allow a reasonable-mistake defense [as to the victim's age]").

39. *See id.* § 2[a], at 508 (observing that, under the majority rule, "[p]roof of statutory rape requires merely proof of an act of sexual intercourse and proof that the victim is below the prohibited age").

40. 393 P.2d 673 (1964).

41. *See* Campbell, *supra* note 38, at 499 (noting that prior to the *Hernandez* decision in 1964, "it was the universally accepted rule in the United States that a defendant's mistaken belief as to the age of a victim was not a defense to a charge of statutory rape" (citing People v. Hernandez, 393 P.2d 673 (Cal. 1964))).

42. *Hernandez*, 393 P.2d at 677. The *Hernandez* court specifically addressed and overturned *People v. Ratz*, 46 P. 916 (Cal. 1896), which held that intent was not a necessary element for statutory rape and thus an instruction to the jury regarding the defendant's lack of knowledge of the victim's age was unwarranted, *Ratz*, 46 P. at 916, and *People v. Griffin*, 49 P. 711 (Cal. 1897), which held that it was no defense to the charge of statutory rape that the defendant did not know that the victim had a mental infirmity and thus was incapable of giving consent, *Griffin*, 49 P. at 712. *Hernandez*, 393 P.2d at 677.

dial concepts" of criminal jurisprudence, namely that under the common law notion of mens rea, "it is not conduct alone but conduct accompanied by certain specific mental states which concerns, or should concern the law."[43] The *Hernandez* court refuted the assumption used to eliminate intent as an element in previous statutory rape cases: that the wrongdoer assumes the risk when the act is committed, regardless of the age of the female or circumstances surrounding the act.[44] The court explained:

> There can be no dispute that a criminal intent exists when the perpetrator proceeds with utter disregard of, or in the lack of grounds for, a belief that the female has reached the age of consent. But if he participates in a mutual act of sexual intercourse, believing his partner to be beyond the age of consent, with reasonable grounds for such belief, where is his criminal intent? In such circumstances he has not consciously taken any risk. Instead he has subjectively eliminated the risk by satisfying himself on reasonable evidence that the crime cannot be committed. If it occurs that he has been mislead, we cannot realistically conclude that for such reason alone the intent with which he undertook the act suddenly becomes more heinous.[45]

The court's position is supported by the California Penal Code's treatment of intent in section 20 of the California Penal Code, which provides that "there must exist a union, or joint operation of act and intent, or criminal negligence" to constitute the commission of a crime.[46] Section 26 of the California Penal Code adds that one is not capable of committing a crime "who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent."[47] Clearly, the California Supreme Court's recognition and application of common law notions of a requisite criminal intent, coupled with modern legal postulates[48] regarding the

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43. *Id.* at 675.

44. *Id.* at 676.

45. *Id.*

46. CAL. PENAL CODE § 20 (West 1988).

47. *Id.* § 26.

48. *See Hernandez*, 393 P.2d at 675 (discussing the California Penal Code's requirement of a "joint operation of act and intent" (internal quotation marks omitted) (quoting Cal. Penal Code § 26)); *see also id.* at 676 n.2 (referencing the MODEL PENAL CODE's provision in section 213.6.(1) concerning mistake as to age (quoting MODEL PENAL CODE § 213.6.(1) (Proposed Official Draft 1962)).

affirmative defense of mistake of fact, inspired this fundamental change in course with regard to statutory rape law.[49]

To date, a total of three jurisdictions have followed California's example and created a judge-made defense: Alaska, New Mexico, and Utah.[50] In *State v. Guest*,[51] the Alaska Supreme Court considered whether an honest and reasonable mistake of fact regarding the victim's age may serve as a defense to statutory rape.[52] Unlike the California Supreme Court, which relied on common law principles and the inferred intent from other statutory provisions to allow for the affirmative defense of mistake of fact, the Alaska Supreme Court scrutinized the need for an intent requirement from a constitutional perspective.[53] In support of its decision to import a mens rea requirement, the court relied on prior opinions where it had held that "it would be a deprivation of liberty without due process to convict a person of a serious crime without the requirement of criminal intent."[54] According to the *Guest* court, if a particular statute is not aimed at regulating a public welfare offense,[55] only two options exist: either a requirement of criminal intent must be read into the statute or the statute must be found to be unconstitutional.[56] Because of the judiciary's general reluctance to declare laws unconstitutional, the

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49. No constitutional claim was raised, and the California Supreme Court did not address the constitutionality of a statute that did not require mens rea. Indeed, the court used the common law and language in other sections of the California Penal Code to infer an intent requirement into the rape statute. *See supra* note 42 and accompanying text (noting the movement of the court away from imposing criminal sanctions absent culpability where the governing statute expressed no legislative intent or policy to be served by strict liability); *see also Hernandez*, 393 P.2d at 676-77 (noting the recent use of sections 20 and 26 in the Penal Code to find an intent requirement for the crime of bigamy).

50. *See* Campbell, *supra* note 38, § 3, at 513, § 4, at 518; State v. Guest, 583 P.2d 836 (Alaska 1978); Perez v. State, 803 P.2d 249 (N.M. 1990); State v. Elton, 680 P.2d 727 (Utah 1984); *see also* Garnett v. State, 332 Md. 571, 583, 632 A.2d 797, 803 (1993) (discussing the fact that the highest appellate courts of four states have determined that statutory rape laws require an element of mens rea as to the victim's age).

51. 583 P.2d 836.

52. *Id.* at 837.

53. *See id.* at 838.

54. *Id.* (citing Alex v. State, 484 P.2d 667, 680-81 (Alaska 1971); Speidel v. State, 460 P.2d 77, 80 (Alaska 1969)).

55. The Alaska Supreme Court stated in *Speidel v. State*, that exceptions to the requirement of criminal intent exist for "public welfare" offenses under strict liability. *Speidel*, 460 P.2d at 78. Strict liability crimes, according to the court, are a narrow class of regulation for which the penalties are often relatively small and conviction carries no great opprobrium. *Id.* at 79.

56. *Guest*, 583 P.2d at 839 (citing Kimoktoak v. State, 584 P.2d 25, 29 (Alaska 1978); *Alex*, 484 P.2d at 680-81; *Speidel*, 460 P.2d at 80).

court decided instead to read a requirement of criminal intent into the statutory rape statute.[57]

Alaska recently reaffirmed its position in *State v. Fremgen*,[58] in which the Alaska Supreme Court upheld a lower court's decision declaring unconstitutional a statute which prohibited a defendant from presenting a mistake of age defense.[59] The court maintained that a refusal to allow the mistake of age defense to statutory rape would impose criminal liability without a criminal intent, thus violating Alaska's Constitution.[60] The court reiterated that because crime is a "compound concept," it only results from the "concurrence of an evil-meaning mind with an evil-doing hand."[61]

New Mexico addressed the issue of whether mistake of fact should be a permissible defense to statutory rape in *Perez v. State*.[62] The New Mexico Supreme Court relied on the structure of its statutory rape laws to infer the legislature's intention to treat defendants differently depending on the age of the victim.[63] In New Mexico, "[c]riminal sexual penetration of a child under thirteen is always a first-degree felony."[64] But when a child is between thirteen and sixteen years of age, and the defendant is at least eighteen years of age, the crime is fourth-degree sexual penetration.[65] This distinction led the court to determine that while the protection afforded by strict liability is necessary for children under thirteen, the same is not true of victims aged thirteen to sixteen.[66] As a result, the court held that,

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57. *Id.* at 839 & n.7 (citing *Kimoktoak*, 584 P.2d at 31; Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978); State v. Martin, 532 P.2d 316, 321 (Alaska 1975); Hoffman v. State, 404 P.2d 644, 646 (Alaska 1965)).

58. 914 P.2d 1244 (Alaska 1996).

59. *Id.* at 1246.

60. *See id.* at 1245.

61. *Id.* at 1245 n.2.

62. 803 P.2d 249 (N.M. 1990).

63. *Id.* at 251.

64. *Id.* (citing N.M. STAT. ANN. § 30-9-11(a) (Michie 1978)).

65. *See id.* (referencing N.M. STAT. ANN. § 30-9-11(d) (Michie 1978)).

66. *Id.* (concluding that the "statutes clearly reflect the legislature's intention that defendants charged with criminal sexual penetration be treated differently depending on the age of the victim" and that this policy is consistent with "protecting those least able to make free decisions about whether to engage in sexual activity" (citing State v. Hargrove, 771 P.2d 166, 171 (N.M. 1989)); *see also* State v. Jalo, 696 P.2d 14, 16 (Or. 1985) (holding that because an Oregon statute created different liabilities for sexual intercourse with persons under 18, under 16, under 14, and under 12, a reasonable mistake of age defense was not available in determining whether a partner was 16); State v. Dodd, 765 P.2d 1337, 1338 (Wash. App. 1989) (holding that the defendant's mistaken belief that the girl was 15 years old may exonerate the defendant of the crime of sexual intercourse with someone under 14, but not the lesser-included offense of having relations with someone under 16).

because the victim was older than thirteen, the defendant in *Perez* should have been allowed to present the defense of mistake of fact.[67]

In *State v. Elton*,[68] the Utah Supreme Court construed the state's unlawful sexual intercourse statute[69] to mean that a conviction could not lie unless the state proved a criminal intent as to each element of the offense, including the victim's age.[70] The court pointed to the requirement, under Utah law, that for an offence to be considered a strict liability offense, the statute defining the offense must "clearly indicat[e] a legislative purpose to impose strict liability."[71] The court, therefore, concluded that because Utah's unlawful sexual intercourse statute did not mention strict liability, the element of criminal intent must be included.[72] The Utah legislature, however, has since amended its code to disallow mistake of age as a defense to unlawful sexual intercourse.[73]

While most of the higher courts that have addressed this issue have declined to follow *Hernandez*, the California decision has had a resounding impact upon state legislatures.[74] In fact, some variation of the mistake of age defense now exists in seventeen states.[75] Moreover, federal criminal law permits a mistake of age defense under 18 U.S.C. § 2243.[76] Finally, the American Law Institute (ALI), in its Model Penal Code, also provides for an affirmative defense of mistake of fact.[77] Specifically, the ALI's Model Penal Code states:

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67. *Perez*, 803 P.2d at 251. The court further commented that "[s]ection 30-9-11(d) is a 'numbers game,' whose outcome is determined not only by the child's age, but by the relative age of the defendant. When the law requires a mathematical formula for its application, we cannot say that being provided the wrong numbers is immaterial." *Id.*

68. 680 P.2d 727 (Utah 1984).

69. UTAH CODE ANN. § 76-5-401 (1953).

70. *Elton*, 680 P.2d at 729.

71. *Id.* at 729 (internal quotation marks omitted) (quoting UTAH CODE ANN. § 76-2-102 (1953)).

72. *See id.*

73. *See* UTAH CODE ANN. § 76-2-304.5(2) (1995) (providing that mistake of age is not a defense to unlawful sexual intercourse).

74. *See* Campbell, *supra* note 38, § 2(a), at 309 (noting that although only four jurisdictions have followed the example of *Hernandez* and created a judicially-made defense to statutory rape, "*Hernandez*' greatest impact has been with state legislatures").

75. *See id.*

76. 18 U.S.C. § 2243(c) provides:

> In a prosecution [for engaging in a sexual act with another person who has attained the age of 12 years but has not attained the age of 16 years, and is at least four years younger than the person so engaging] it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

18 U.S.C. § 2243(c) (Supp. 1999).

77. MODEL PENAL CODE § 213.6(1) (Proposed Official Draft 1962).

> Whenever . . . the criminality of conduct depends upon a child being below the age of 10, it is no defense that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child's being below a critical age other than 10, it is a defense for the actor to prove that he reasonably believed the child to be above the critical age.[78]

A mistake of fact defense to statutory rape is not a new or novel shift in legal perspectives, as is evidenced by the fact that seventeen states and the federal government, via legislation, four states, via judicial caveat, and the Model Penal Code have established or ascertained this affirmative defense as a critical requirement for fair and judicious prosecutions. As discussed below, the Maryland legislature failed to capitalize on the opportunity in 1976 and 1977 to include a mens rea element in the crime of statutory rape. It is the duty of the court, however, to ensure that the majority's craftsmanship in the legislature does not come at the expense of minority rights. As the following section demonstrates, Maryland courts have permitted the constitutional rights of its defendant-citizens to be overlooked.

c. Statutory Rape as a Strict Liability Crime in Maryland.—

(1) The Development of Statutory Rape Provisions in Maryland.— Rape and other sexual offenses were reformed and codified during the 1976 and 1977 sessions of the Maryland legislature.[79] The two most significant modifications included: (a) an increased number of degrees of sexual offenses, distinguishable by the type of contact that existed between the defendant and the victim;[80] and (b) in cases of statutory rape, a requirement that the defendant be at least four years older than the victim.[81] A mens rea requirement for statutory rape did appear in the Senate version of the Sexual Offenses Act.[82] For

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78. *Id.*

79. *See* J. William Picher, Note, *Rape and Other Sexual Offense Law Reform in Maryland*, 7 U. BALT. L. REV. 151-52 (1977) (discussing the evolution of the comprehensive legislation regarding rape and sexual offenses which emerged from the 1976 and 1977 Maryland legislative sessions).

80. *See id.* at 159-162 (discussing the two degrees of rape and the four degrees of sexual offense created by the Maryland legislature in 1976).

81. *See id.* at 160-61 (discussing the two subsections of second degree sexual offense developed by the 1976-77 legislative session; section 463(a)(3) pertains to a sexual offense committed with a person under the age of fourteen, with the perpetrator at least four years old, and section 463(a)(3) pertains to a sexual offense committed with a person under the age of sixteen, with the perpetrator at least four years older).

82. 1976 MARYLAND SENATE JOURNAL vol. I, S. 358, at 1363-65 (providing that "the person performing the sexual act knows or should know" that the person was under the age of consent). Additionally, the Senate version mandated a first degree sexual offense if the

reasons unclear in the legislative history, however, the House of Delegates rejected the Senate amendments in favor of their version which did not require mens rea in its definition of statutory rape.[83] The House version ultimately became law.[84]

Statutory rape offenses, defined in article 27 of the Annotated Code of Maryland, are prosecuted under four separate categories: second degree rape, and second, third, and fourth degree sexual offenses. Second degree rape requires vaginal intercourse with a person who is under fourteen years of age by a person who is at least four years older than the victim.[85] Any person violating this provision is guilty of a felony and upon conviction is subject to imprisonment for up to twenty years.[86]

A second degree sexual offense requires the engaging in a sexual act with a person who is under fourteen years of age by a person who is at least four years older than the victim.[87] Any person violating this provision is also guilty of a felony and upon conviction is subject to imprisonment for up to twenty years.[88]

A third degree sexual offense requires sexual contact with a person who is under fourteen years of age by a person who is at least four years older than the victim.[89] Third degree sexual offenses also include sexual acts or vaginal intercourse with a person either fourteen or fifteen years of age with the person performing the sexual act or intercourse at least twenty-one years of age.[90] Any person violating

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victim was under the age of twelve, while second, third, and fourth degree offenses protected those under the age of fourteen. *Id.* at 1363.

83. *See Garnett*, 332 Md. at 587, 632 A.2d at 805 (citing 1976 MARYLAND HOUSE JOURNAL, vol. II, S. 358, at 3761).

84. *See* 1976 Md. Laws 1536.

85. *See* MD. ANN. CODE art. 27, § 463(a)(3) (1996).

86. *See id.* § 463(b).

87. *See id.* § 464A(a)(3). The definition of "sexual act" includes cunnilingus, fellatio, anilingus, or anal intercourse, but expressly excludes vaginal intercourse. *See id.* § 461. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body if the penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for abuse of either party and if the penetration is not for accepted medical purposes. *See id.*

88. *See id.* § 464A(b).

89. *See id.* § 464B(a)(3). "Sexual contact" is defined as the intentional touching of any part of the victim's or actor's anal or genital area or other intimate parts for the purposes of sexual arousal or gratification or for abuse of either party and includes the penetration, however slight, by any part of a person's body, other than the penis, mouth, or tongue into the genital or anal opening of another person's body if that penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for the abuse of either party. *See id.* § 461. It does not include acts commonly expressive of familial or friendly affection, or acts for accepted medical purposes. *See id.*

90. *See id.* § 464B(a)(4)-(a)(5).

this provision is guilty of a felony and upon conviction is subject to imprisonment for up to ten years.[91]

A fourth degree sexual offense requires the engaging in sexual acts or vaginal intercourse with a person either fourteen or fifteen years of age, and the person performing the act must be at least four years older than the victim.[92] Any person violating this provision is guilty of a misdemeanor and upon conviction is subject to imprisonment for up to one year, and a $1000 maximum fine.[93]

While Maryland largely distinguishes the degrees of the offense of statutory rape by the type of contact that existed between the perpetrator and the victim, the state also plays the "numbers game" by designating that vaginal intercourse and sexual acts committed on a person of the age of fourteen or fifteen years a crime of a lesser degree.[94] Not only does the age of the victim determine the degree of the crime, but the age of the defendant does as well: defendants who are twenty-one years or older are prosecuted for a felony for the same act that, when committed by a twenty-year-old, would be a misdemeanor.[95] Despite the willingness to treat potential defendants differently based on their age (an unmalleable fact of convenience for the court but an unfortunate fact of coincidence for the defendant), the following section will demonstrate that the Maryland courts have refused to treat potential defendants differently with respect to their mental state at the time of the crime.

(2) Maryland Case Law: Garnett v. State.—In 1993, the Court of Appeals, in *Garnett v. State*,[96] considered whether the statutory rape law should, by implication, require an element of mens rea as to the victim's age.[97] In *Garnett*, a twenty-year-old retarded man with an IQ of fifty-two, was charged with statutory rape for having intercourse with a fifteen-year-old girl.[98] The defense proffered evidence that the victim had previously told Garnett that she was sixteen, yet the trial court excluded the evidence as immaterial, ruling that

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91. *See id.* § 464B(b).

92. *See id.* § 464C(3).

93. *See id.* § 464C(b).

94. *See supra* note 70 and accompanying text (discussing the *Perez* court's comments that New Mexico's statutory rape offenses were a "'numbers game' whose outcome is determined not only by the child's age, but by the relative age of the defendant").

95. *See* MD. ANN. CODE art. 27, §§ 464B(a)(4)-(a)(5) & 464C(a)(2)-(a)(3).

96. 332 Md. 571, 632 A.2d 797 (1993).

97. *Id.* at 583, 632 A.2d at 803.

98. *Id.* at 574, 632 A.2d at 798. Garnett's guidance counselor stated that Garnett read on the third-grade level, did arithmetic on the fifth-grade level, and interacted with others socially at the level of an 11- or 12-year-old. *See id.*

"the only requirements for establishing guilt are that there was vaginal intercourse, [and] that [the victim] was under fourteen years of age and [the defendant] was at least four years older."[99]

In its majority opinion, the Court of Appeals acknowledged the common law requirement that an accused have acted with a culpable mental state,[100] and recognized the modern criticisms of statutory rape as a strict liability crime.[101] Based on the statute's legislative history, however, the court concluded that the current law imposed strict liability for statutory rape offenses and did not allow for a mistake of age defense.[102] Because the legislature "explicitly raised, considered, and then explicitly jettisoned any notion of a *mens rea* element with respect to the . . . [victim's] age," the court believed that any new provision introducing mens rea or permitting a defense of reasonable mistake of age should come from the legislature.[103]

The two dissenting judges, Judges Eldridge and Bell, each asserted notably different reasons for disagreeing with the majority. Judge Eldridge agreed with the majority that "an ordinary defendant's" mistake of age was not a defense to the crime of statutory rape.[104] Judge Eldridge, however, did not believe that, by rejecting one specific knowledge requirement, the legislature had necessarily mandated that all evidence concerning the defendant's knowledge was immaterial.[105] He justified this argument on the following grounds: (1) other strict liability crimes existed in which the legislature had not intended to impose criminal liability regardless of the defendant's state of mind;[106] and (2) the penalty provision associated

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99. *See id.* at 575, 632 A.2d at 799 (internal quotation marks omitted).

100. *Id.* at 578, 632 A.2d at 800 (discussing Justice Robert Jackson's statements in *Morissette v. United States*, 341 U.S. 246 (1952), which emphasized the universal notion that evil intent is required for a crime to occur).

101. *See id.* at 579, 632 A.2d at 801 (discussing the rejection of the concept of strict criminal liability by modern scholars, including Professors LaFave and Scott, and Dean Richard G. Singer; the court specifically cites Dean Singer's conclusion that "the predicate for all criminal liability is blameworthiness; it is the social stigma which a finding of guilt carries that distinguishes the criminal [penalty] from all other sanctions. If the predicate is removed, the criminal law is set adrift" (citing Richard G. Singer, *The Resurgence of* Mens Rea: *The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 404-05 (1988))).

102. *Id.* at 584-87, 632 A.2d at 803-05.

103. *Id.* at 587-88, 632 A.2d at 805.

104. *Id.* at 589, 632 A.2d at 806 (Eldridge, J., dissenting).

105. *Id.* (asserting that although a defendant's mistake as to the age of the victim is not a defense to a statutory rape charge, this "does not mean, however, that the [statutory rape] statute contains no *mens rea* requirement at all").

106. *See id.* at 589-90, 632 A.2d at 806 (stating that such offenses "do require 'fault' to the extent that they can be interpreted as legislative judgment that persons who intentionally engage in certain activities and occupy some peculiar or distinctive position of control are to be held accountable for the occurrence of certain consequences" (quoting W.

with violating the statutory rape law was severe,[107] which constituted strong evidence that the Legislature did not intend to create a pure strict liability offense.[108] Judge Eldridge concluded that the Legislature assumed that a defendant would be able to appreciate the risk involved with intentionally and knowingly engaging in sexual activities with a young person.[109] Judge Eldridge asserted that "[t]here is no indication that the General Assembly intended that criminal liability attach to one who, because of his or her mental impairment, was unable to appreciate the risk."[110]

Chief Judge Bell, on the other hand, argued that "[t]o hold *as a matter of law*, that . . . [the statutory rape law] does not require the State to prove that a defendant possessed the necessary mental state to commit the crime, . . . 'offends a principle of justice so rooted in the traditions of conscience of our people as to be ranked as fundamental' and is, therefore, inconsistent with due process."[111] Judge Bell emphasized the common law notions of criminal action, namely that "a wrongful act and a wrongful intent must concur to constitute what the law deems a crime."[112] Referring to a recently decided case concerning the strict liability crime of carrying a concealed weapon, Judge Bell argued that criminal intent can and should be read into a statute when the statutory language does not expressly require an element of criminal intent.[113]

According to Chief Judge Bell, while a state legislature has the power to define the elements of the criminal offenses within its jurisdiction, it may not do so with impunity.[114] Strict criminal liability,

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LAFAVE & A. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW ch. 3, § 3.8(c), at 349 (1986)). Judge Eldridge, however, failed to enumerate the "not-so-strict" liability crimes he references in his opinion.

107. Section 463(a) of the Annotated Code of Maryland provides that the felony of statutory rape is punishable by a maximum of 20 years imprisonment. *See* MD. ANN. CODE art. 27, § 463(b) (1996).

108. *See Garnett*, 332 Md. at 590, 632 A.2d at 806 (Eldridge, J., dissenting).

109. *Id.* at 590-91, 632 A.2d at 806-07 (stating that because the defendant *knows* that the activity is considered immoral or improper and *knows* that 'consent' by persons too young is ineffective, he has, after *appreciating this risk*, intentionally determined to engage in the sexual conduct).

110. *Id.* at 591, 632 A.2d at 807.

111. *Id.* at 593-94, 632 A.2d at 808 (Bell, C.J., dissenting) (quoting United States v. Ranson, 942 F.2d 775, 776-77 (10th Cir. 1991) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

112. *Id.* at 595 (quoting Dawkins v. State, 313 Md. 638, 643, 547 A.2d 1041, 1043 (1988)).

113. *Id.* at 597, 632 A.2d 810 (referring to *Anderson v. State*, 328 Md. 426, 444 (1992), which held that to convict a defendant of carrying a concealed dangerous weapon, proof that the defendant intended to use the object as a weapon is required).

114. *Id.* at 612, 632 A.2d at 817.

Chief Judge Bell argued, is limited by state and federal constitutions.[115] Both the Due Process Clause of the Fourteenth Amendment and article 24 of Maryland's Constitutional Declaration of Rights "protect[ ] an accused from being convicted of a crime except upon proof beyond a reasonable doubt of *every element necessary to constitute the crime.*"[116] Judge Bell concluded that when the legislature promulgates a statute that excludes the defendant's mental state as an element, it creates an irrebuttable presumption which runs afoul of the Due Process Clause of the Fourteenth Amendment.[117]

3. The Court's Reasoning.—In *Owens v. State*, the Court of Appeals held that a defendant's due process rights were not violated when, upon being charged with statutory rape, the trial court prevented the defendant from presenting his defense that he reasonably believed that the victim was above the age of consent.[118] The court concluded that "[t]he legislature's decision to disallow a mistake-of-age defense to statutory rape furthers its interest in protecting children in ways that may not be accomplished if the law were to allow such a defense."[119]

The court began its opinion with a lengthy recitation of the law concerning mens rea requirements and due process of law.[120] The court then turned to and rejected Owens's argument that due process required him to be allowed to present a mistake of age defense to the charge of statutory rape.[121] The court first explained that cases, both federal and state, did not support Owens's position,[122] noting that "when interpreting the Due Process Clause, the Supreme Court has often endorsed the concept of strict criminal liability."[123] The court

115. *See id.* at 611-12, 632 A.2d at 817.

116. *See id.* at 614, 632 A.2d at 818 (emphasis added) (citing *In re* Winship, 397 U.S. 358, 364 (1970); Mullaney v. Wilbur, 421 U.S. 604, 685 (1975)); *see also* U.S. CONST. art. XIV, § 1 (guaranteeing that no person shall be deprived of life, liberty, or property without due process of law); MD. CONST. DECL. OF RIGHTS art. 24 (providing "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner, destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land").

117. *Garnett*, 332 Md. at 616, 632 A.2d at 819 (Bell, C.J., dissenting) (stating that irrebuttable presumptions have historically been disfavored because they conflict with overriding presumptions of innocence afforded to the accused and that they have inhibited the fact-finding process of the jury).

118. *Owens*, 352 Md. at 667, 724 A.2d at 45.

119. *Id.* at 685, 724 A.2d at 54.

120. *Id.* at 668-74, 724 A.2d at 45-48.

121. *Id.* at 674-75, 724 A.2d at 48-49.

122. *Id.* at 676, 724 A.2d at 49.

123. *Id.* at 677, 724 A.2d at 50.

also dismissed the risk of significant punishment as a factor supporting the unconstitutionality of statutory rape as a strict liability crime, noting that the substantiality of the penalty has only been used as an indicator of legislative intent, not as a constitutional litmus.[124]

The court then addressed the due process requirement "that persons of ordinary intelligence and experience have a reasonable opportunity to know what actions are prohibited so that they may conform their conduct according to the law."[125] The majority concluded that the statutory rape law provided "constitutionally sufficient notice."[126] The court explained that the conduct penalized by the statutory rape law was conduct which Owens "could have avoided," as it involved "conscious activity which gives rise to circumstances that place a reasonable person on notice of potential illegality."[127] Moreover, in the case of statutory rape "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age."[128]

Next, the court considered Maryland's interest in enacting the statutory rape law, and how well the law was suited to that interest, concluding that "the state's purpose in promoting the physical and mental health of children is a compelling one and the statute is properly designed to accomplish this purpose."[129] The court described at length, the state's "interest in promoting the welfare of children . . . from the potential harm caused by sexual activity involving children."[130] The legislature, the court reasoned, had enacted rape laws to prevent pregnancies, the risk of venereal diseases, psychological damage, and even permanent damage to a child's organs.[131] The court also emphasized the dangers associated with sexual abuse and sexual assault of children, stressing that "sexual crimes against children exact heavy social costs."[132] Therefore, according to the court,

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124. *Id.* at 678, 724 A.2d at 50.

125. *Id.* at 679, 724 A.2d at 51 (citing Bowers v. State, 283 Md. 115, 120, 389 A.2d 341, 345 (1978)).

126. *Id.*

127. *Id.* at 679-80, 724 A.2d at 51 (citing State v. Tague, 310 N.W.2d 209, 212 (Iowa 1981)).

128. *Id.* at 680, 724 A.2d at 51 (internal quotation marks omitted) (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 n.2 (1994)).

129. *Id.* at 681, 724 A.2d at 52.

130. *Id.*

131. *Id.* at 681-83, 724 A.2d at 52-53.

132. *Id.* at 683, 724 A.2d at 53 (internal quotation marks omitted) (quoting the New Jersey Supreme Court decision in *Doe v. Portiz*, 662 A.2d 367, 375 (N.J. 1995), and its discussion of the research that indicates a number of psychosocial problems that are more common in adults molested as a child).

the "deterrent effect" that results by placing the risk of error in judgment as to a potential sex partner's age solely in the adult is necessary to protect those whose "immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct."[133]

Finally, the court dismissed Owens's argument that the statutory rape statute created an unconstitutional irrebuttable presumption that the defendant intended to engage in the prohibited conduct with one under the age of fourteen.[134] In rejecting this challenge, the court stated that the statute "protects children from sexual conduct," regardless of the defendant's intent to engage in the prohibited conduct and regardless of the victim's purported consent.[135] Thus, the court concluded that there is no irrebuttable presumption of intent under the statute; rather, intent is irrelevant to the injury.[136]

In his dissenting opinion, Judge Bell, joined by Judge Cathell, argued:

> To hold, as a matter of law, that § 463(a)(3) does not require the State to prove that a defendant possessed the necessary mental state to commit the crime, i.e. knowingly engaged in sexual relations with a female under 14, or that the defendant may not litigate that issue in defense, "offends a principle of justice so rooted in the traditions of conscience of our people as to be ranked as fundamental" and is, therefore, inconsistent with due process.[137]

Judge Bell maintained that section 463(a)(3) offends both substantive and procedural due process.[138] Substantive due process requires that the defendant possess some level of fault for a criminal conviction, while procedural due process requires that the prosecution overcome

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133. *Id.* at 684, 724 A.2d at 53 (quoting People v. Cash, 351 N.W.2d 822, 826-27 (Mich. 1984)).

134. *Id.* at 687, 724 A.2d at 55.

135. *Id.* at 688, 724 A.2d at 55.

136. *See id.* at 689, 724 A.2d at 56. The court further asserted that even if the statute at issue did create such an irrebuttable presumption, "the nexus between the presumption and the state's interest in protecting children is sufficient enough to ameliorate any due process concerns." *Id.* (citing Rita Eidson, *The Constitutionality of Statutory Rape Laws*, 27 UCLA L. REV. 757, 811 (1980)).

137. *Owens*, 352 Md. at 694, 724 A.2d at 58 (Bell, J., dissenting) (quoting Garnett v. State, 332 Md. 571, 584-85, 632 A.2d 797, 802-04 (1993) (Bell, C.J., dissenting) (citing United States v. Ransom, 942 F.2d 775, 776-77 (10th Cir. 1991) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

138. *See id.* at 695, 724 A.2d at 59 (quoting *Garnett*, 332 Md. at 625, 632 A.2d at 824 (Bell, C.J., dissenting)).

the presumption of innocence by proving the defendant's guilt.[139] Judge Bell emphasized that knowledge of the victim's age is not only proof of the defendant's guilt, "it is absolutely dispositive of it and . . . it is fatal to the only defense the defendant would otherwise have."[140] Thus, according to Judge Bell, section 463(a) destroys absolutely the concept of fault and renders meaningless the presumption of innocence and the right to due process.[141] Judge Bell concluded that where the legality of the activity depends upon the ages of the participants, at the very least the defendant's knowledge of the victim's age must be proven.[142]

Moving to the procedural due process violations, Judge Bell stated that "[e]ven if the appellant were on notice that having sexual relations with someone below the consensual age constitut[ed] statutory rape, this does not mean . . . that the appellant knew that the particular female . . . was underage"[143] and "notice means more than simply cursory knowledge of the law."[144] In fact, the Supreme Court has been reluctant to permit strict liability where it would mean convicting persons whose conduct would not even alert them to the probability of strict regulation.[145] Judge Bell also criticized the majority for overlooking the second prong of the procedural due process test: the opportunity to present a defense.[146] In denying the defendant this opportunity, Judge Bell concluded that the court has made the appellant the victim of an irrebuttable presumption which cannot pass constitutional scrutiny.[147]

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139. *See id.* Judge Bell disagreed with the majority's rationale that the legislature has absolute authority to create strict liability crimes because a "culpable mental state is and continues to be an essential element of a criminal offense . . ." without which occurs a violation of a defendant's due process rights and each defendant ought to be protected from "unfair procedure and from deprivation of substantive rights." *Id.* at 697, 724 A.2d at 60.

140. *Id.* at 696, 724 A.2d at 59 (internal quotation marks omitted) (quoting *Garnett*, 332 Md. at 626, 632 A.2d at 824 (Bell, C.J., dissenting)).

141. *Id.*

142. *Id.* at 700-01, 724 A.2d at 61-62 (criticizing the majority for "forgetting that the critical issue in a statutory rape case is the 'age of the rape victim' which serves two related, but distinct purposes: (1) it establishes the victim's capacity to consent and (2) it represents notice to a defendant of a proscribed conduct").

143. *Id.* at 698, 724 A.2d at 60.

144. *Id.* (citing Staples v. United States, 511 U.S. 600 (1994)).

145. *Id.* at 699, 724 A.2d at 61 (citing *Staples*, 511 U.S. at 618).

146. *Id.* at 700, 724 A.2d at 61; *see also id.* at 702, 724 A.2d at 62 (arguing that the right to present a defense is a fundamental substantive due process right that must be weighed against the state's interest in "promoting the physical and mental health of children").

147. *Id.* at 701, 724 A.2d at 62.

4. Analysis.—Writing for the Supreme Court in *Morissette v. United States*, Justice Robert Jackson observed:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[148]

This statement embodies the fundamental notion that establishing criminal intent is the cornerstone of the American scheme of justice, strikes at the heart of due process, and thus, is indispensable to our system of law.[149] This fundamental notion can be salvaged in statutory rape crimes by allowing defendants, such as Owens, to present a reasonable mistake of fact defense. Notwithstanding the fact that statutory rape does not fall within the traditionally permissible categories of strict liability crimes, the prohibition of a mistake of fact defense violates substantive and procedural due process and creates an unconstitutional irrebuttable presumption of culpability.

a. Prohibiting a Mistake of Fact Defense to Statutory Rape Violates Procedural and Substantive Due Process.—The protection of fundamental rights from arbitrary and unreasonable action is the bedrock of due process.[150] Toward that end, legislation must be fair and reasonable in content (substantive due process) as well as application (procedural due process).[151] The Supreme Court has utilized the concept of

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148. Morissette v. United States, 342 U.S. 246, 250 (1952).

149. *Cf.* Duncan v. Louisiana, 391 U.S. 145, 148 (1968) (noting that the test for determining whether a right is protected against state action by the Fourteenth Amendment often looks to whether the right is "among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932))).

150. *See* Jeffries v. Turkey Run Consol. Sch. Dist., 492 F.2d 1, 3 (7th Cir. 1974) (stating that the constitutional right to "substantive due process," or the freedom from arbitrary and capricious government action, requires that an interest in liberty or property be impaired).

151. *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 295 (1994) (Stevens, J., dissenting) (stating that the Court has recognized that a variety of state actions have such serious effects on protected liberty interests that they may not be undertaken arbitrarily, or without observing procedural safeguards); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (demonstrating concern for procedural due process when stating that "where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential"); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (demonstrating concern for substantive due process by holding that state law requiring parents to send children to public school violates due process because "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State").

"liberty" in the Fourteenth Amendment to embrace certain fundamental values as within its constitutional interpretive authority.[152] From protecting the economic and property rights in *Lochner v. United States*[153] to finding a fundamental right to privacy in *Griswold v. Connecticut*,[154] the Supreme Court has interpreted liberty to encompass a number of principles deemed to be rooted in "the very nature of our free Republican government."[155]

Surely a right to present a defense on one's behalf in a criminal proceeding is to secure that liberty our Constitution seeks to protect.[156] The goal of "preventing miscarriages of justice and assuring that fair trials are provided for all defendants"[157] is evidenced by the fact that many of the explicit provisions of the Bill of Rights pertaining to the criminal process have been applied to the states by the Due Process Clause of the Fourteenth Amendment: the Fourth Amendment right to be free from unreasonable searches and seizures;[158] the Fifth Amendment right against compelled self-incrimination;[159] and the Sixth Amendment rights to counsel,[160] to a speedy trial,[161] and to confrontation of witnesses.[162]

Included in a defendant's fundamental due process rights is the right to present a defense, or a right "to a fair opportunity to defend

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152. The Supreme Court in *Duncan v. Louisiana* discussed the many rights that have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment: the rights of speech, press, religion, the rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized, the right to be free of compelled self-incrimination, the right to counsel, to a speedy and public trial, and to confront witnesses. 391 U.S. at 146, 148 (1968).

153. 198 U.S. 445 (1905) (holding that the right to contract for weekly work hours was protected as a fundamental right under the Due Process Clause of the Fourteenth Amendment).

154. 381 U.S. 479 (1965) (holding that the right to use contraception within a marriage was protected by the Due Process Clause of the Fourteenth Amendment).

155. Calder v. Bull, 3 U.S. 386 (1789) (demonstrating an early inclination to invalidate legislation apart from explicit constitutional limitations).

156. *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 296 (1994) (stating that "an official accusation of serious crime has a direct impact on a range of identified liberty interests" and that impact is of "sufficient magnitude to qualify as a deprivation of liberty warranting constitutional protection").

157. *Duncan*, 391 U.S. at 148.

158. *See* Mapp v. Ohio, 367 U.S. 643, 647 (1961) (citing Weeks v. United States, 232 U.S. 383, 391-92 (1914)).

159. *See* Malloy v. Hogan, 378 U.S. 1, 3 (1964).

160. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

161. *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

162. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965).

against the State's accusations."[163] The Maryland legislature's failure to designate such an opportunity for the accused within its statutory rape provision constitutes an unconstitutional omission that the judiciary has a duty to remedy.[164]

Procedural due process is the principle of fairness that governs the means by which government deprives a person of some life, liberty or property interest.[165] Timothy Owens was deprived of his liberty when he was convicted of the felony of statutory rape.[166] This deprivation will be continuous as there are particular rights to which Owens will no longer be privy and obligations that he must now endure, namely, he is not permitted to vote in federal elections,[167] and he is forced to register as a child sex offender for the rest of this life.[168]

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163. *Owens*, 352 Md. at 702, 724 A.2d at 62 (Bell, C.J., dissenting) (quoting Taliaferro v. State, 295 Md. 376, 403, 456 A.2d 29, 44 (1983) (quoting Chambers v. Mississippi, 410 U.S. 284 (1973))).

164. *See* Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law and Due Process*, 24 WAYNE L. REV. 1571, 1621 (1978) (stating that a constitutional rule against strict criminal liability requires "only that the defendant be given an opportunity to litigate his culpability respecting each element of the offense, . . . it does not disturb the legislative choice except to the extent the legislature wants to both designate some fact as an element and wants to make irrelevant defendant's culpability as to that fact").

165. *See* Board of Regents v. Roth, 408 U.S. 564, 569 (1972) (stating that the "requirements of procedural due process apply only to the deprivation of interests encompassed by the 14th Amendment's protection of liberty and property").

166. *See Owens*, 352 Md. at 668, 724 A.2d at 45 (noting that Owens was sentenced to "18 months of imprisonment for statutory rape, although it was suspended").

167. *See* MD CONST. art. I, § 4 (limiting the right to vote of a person convicted of an infamous or another serious crime). According to the Human Rights Watch, 46 states prohibit felons from voting while incarcerated, 32 states prohibit felons from voting while on parole, 29 states prohibit voting while on probation, and 14 states prohibit convicted felons from voting for life. Of these 14 states which prohibit voting for life, Tennessee and Washington only prohibit voting for those convicted prior to 1986 and 1984 respectively, and Maryland and Arizona only prohibit voting for life after the conviction of the second felony. The remaining ten states: Alabama, Delaware, Florida, Iowa, Kentucky, Mississippi, Nevada, New Mexico, Virginia and Wyoming prohibit persons from voting for life after the first felony conviction. *See* Human Rights Watch & The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (visited May 23, 2000) <http://www.hrw.org/reports98/vote/>.

168. *See* MD. ANN. CODE art. 27, § 792. Section 792 provides, in relevant part, that child sexual offenders shall register with the local law enforcement agency of the county where the child sexual offender resides. *Id.* § 792(c)(3). The registration shall include the registrant's name, address and place of employment, a description of the crime for which the registrant was convicted, the date of conviction, the jurisdiction in which the registrant was convicted, a list of any aliases used by the registrant and the registrant's Social Security number. *Id.* § 792(d)(1)(i)-(vi). The authority shall also obtain a photograph and fingerprints from the registrant. *Id.* § 792(d)(2). The Department of Public Safety and Correctional Services shall maintain a central registry of registrants to be released to the public in accordance with regulations. *Id.* § 792(d)(3)(ii), (d)(5).

The constitutional safeguards of due process must be available at every step of a state process that seeks to brand its citizens with the lifetime stigma of convicted felon and child sex offender.[169] Minimal procedural due process demands that parties whose rights are to be affected are entitled to be heard and notified of that right.[170] Owens's rights were clearly affected, and he was, as all defendants of felonies ought to be, entitled to be heard—to present a defense. The Maryland statute, however, pertinaciously precluded Owen from presenting a defense.

Such a procedural defect results in the inequitable treatment of defendants facing statutory rape charges. Defendants who behave negligently or with reckless disregard for the age of the victim are deemed by law to be as guilty as those who are induced to perform a sexual act with a woman who falsely asserts that she is of the age of consent. It is intellectually dishonest to mask these obvious, and otherwise relevant, differences by the swift imposition of a guilty verdict. Without some form of mens rea requirement for statutory rape, the state convicts equally those who are not equally culpable.

c. Statutory Rape as a Strict Liability Crime Establishes Unconstitutional Irrebuttable Presumptions, which Conflict with Traditional Presumptions of Innocence.—The importance of establishing intent as an individual element to a crime, as opposed to relying on presumptions, was emphasized in *Morissette v. United States*, in which the Court stated that "the trial court may not withdraw or prejudge the issue by instruction [to the jury] that the law raises a presumption of intent from the act."[171] The Court has also stated that Congress's power to dispense with the intent requirement is subject to constitutional limits of the Fourteenth Amendment's due process requirement.[172] Thus, irrebut-

169. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (stating that "only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented"); *see also supra* note 151 and accompanying text (discussing Supreme Court decisions which have found statutes and processes that impose sordid labels or attach unpalatable stigma to a person without a hearing unconstitutional).

170. *See* Fuentes v. Shevin, 407 U.S. 67, 79-81 (1972) (holding that prejudgment replevin statutes deprived a defendant of property without procedural due process of law as they denied an opportunity to be heard before chattels were taken).

171. Morissette v. United States, 342 U.S. 246, 274 (1952) (concluding that the mere omission of any mention of intent is not to be construed as eliminating that element from the crime defined; thus, a statute which made it a crime to convert government property, to be constitutionally valid, requires a defendant to possess the criminal intent to wrongfully or maliciously deprive another of property).

172. *See* Lambert v. California, 355 U.S. 225, 227 (1957) (holding that a person without knowledge of the duty to register with the city may not be convicted under a felon registration law consistent with due process).

table presumptions, present in both the Maryland court's instructions to infer intent and the legislature's power to dispense with intent, have "long been disfavored and held violative of due process."[173]

Maryland's statutory rape law presumes two things: first, that girls under fourteen years of age are incapable of providing competent consent to sexual intercourse,[174] and second, that the perpetrator knew or should have known that he was engaging in sexual intercourse with a girl under the age of fourteen.[175] Yet, as the Supreme Court has recognized, a fact conclusively presumed "is not necessarily or universally true in fact."[176] Therefore, by excusing the prosecutor from having to establish the truth of the fact, statutory rape is rendered arbitrary and capricious, and hence, unconstitutional.[177] The inaccuracy of these presumptions, as applied in *Owens*, demonstrates the veracity of the Supreme Court's statement. The purported victim in *Owens* not only consented to sexual intercourse with the defendant, but facilitated the "crime" by lying to Owens about her age.[178] Owens, whose guilty mind was conclusively presumed by the court, actually acted on the basis of the victim's misrepresentation, a fraud which was foisted upon the police as well. These inconsistencies demonstrate how irrebuttable presumptions, in the words of Justice Scalia, "conflict with the overriding presumptions of innocence with which the law endows the accused and invade the fact-finding function which in a criminal case is [the exclusive province of the jury]."[179]

The majority in *Owens*, after acknowledging that "this court and the Supreme Court have held . . . statutes that create conclusive, irrebuttable presumptions may violate due process,"[180] attempts to justify this violation by claiming that the "nexus between the presumption and the state's interest in protecting children is suffi-

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173. Vlandis v. Kline, 412 U.S. 441, 446 (1973) (invalidating a statute that conclusively presumed that the applicant's residence when he applied for admission to Connecticut University remained his residence throughout his college years).

174. *See Owens*, 352 Md. at 687, 724 A.2d at 55.

175. *See id.*

176. *Vlandis*, 412 U.S. at 452.

177. *Cf.* Mahoney v. Byers, 187 Md. 81, 87, 48 A.2d 600, 603 (1946) (invalidating a Maryland Racing Commission rule that provided if, after testing blood or urine from a horse, the test shows the presence of a drug, the trainer will be subject to penalties whether or not he administered the drug, because the presence of the drug will be conclusive evidence that there was knowledge of the fact on the part of the trainer).

178. *Owens*, 352 Md. at 667, 724 A.2d at 45.

179. Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring) (stating that jury instructions relieving the prosecution of its burden of providing the existence of predicate facts beyond reasonable doubt violate a defendant's due process rights).

180. *Owens*, 352 Md. at 689, 724 A.2d at 55.

cient enough to ameliorate any due process concerns."[181] Thus, the majority casually dismisses this legitimate concern without demonstrating *how* the state's interest in protecting children would be thwarted by allowing the defendant the opportunity to rebut the presumption.

A mistake of fact defense would continue to relieve the prosecution of the burden of proving culpable mens rea to obtain a conviction, but the presumption of culpability would not be *irrebuttable.* The defendant would be permitted to challenge the presumption by proving he acted in a manner that does not warrant the severe punishment and conviction whose imposition is currently automatic.

d. Statutory Rape Does not Fall Within the Permissible Categories of Strict Liability Crimes.—Statutory rape cannot be properly categorized as a public welfare offense as it is a serious felony carrying a potential sentence of twenty years in prison.[182] Society is willing to acquiesce to strict liability for the violation of regulatory edicts because the resulting punishments are light. Maryland's statutory rape provision, however, not only carries a lengthy sentence but requires that child sex offenders register with the county in which they live and submit to DNA testing.[183] This branding of the "scarlet letter" is even more unsettling when one learns that the Maryland Legislature recently passed a law allowing the Department of Public Safety and Correctional Services to post on the Internet a current listing of each person registered as a child sex offender.[184] These can hardly be characterized as light penalties, and arguably indicate that the Legislature's concern is far more with punishment than with regulation. The punishments for statutory rape are far too severe to be included with other public welfare offenses, and far too severe to preclude defendants charged thereunder from demonstrating a lack of criminal intent.

Neither can statutory rape be justified as a strict liability crime by classification as a "lesser legal wrong" offense.[185] To do so would require the defendant to have committed a lesser legal wrong that

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181. *Id.*, 724 A.2d at 56.

182. *See* MD. ANN. CODE art. 27, § 463(b) (1996); *see also* Garnett v. State, 332 Md. 571, 580, 632 A.2d 797, 801 (1993) (stating that statutory rape contrasts markedly with the other strict liability regulatory offenses and their light penalties).

183. *See* MD. ANN. CODE art. 27, § 792.

184. MD. ANN. CODE art. 27, § 792(j)(6) (amending, in May 1999, the authority of the Department of Public Safety and Correctional Services pertaining to the release of information to the public to include the authority to "post on the Internet a current listing of each registrant's name, offense, and other identifying information . . .").

185. *See supra* note 30 and accompanying text (discussing the two historical justifications for strict liability crimes as 'public welfare offenses' and 'lesser legal wrong offenses').

would, in essence, provide the intent for the greater liability crime. The only such possibility is a finding that Owens, in engaging in premarital sex, committed a crime; however, premarital sex is not a crime in the state of Maryland.[186] Therefore, statutory rape exists as somewhat of an anomaly in Maryland's criminal jurisprudence, fitting into neither of the accepted bases—public welfare or lesser legal wrong offenses—for establishing strict criminal liability.

The *Owens*'s court attempted to compensate for this obvious failure by arguing that the real necessity for strict liability crimes is deterrence.[187] The court stated that "precisely because the statute eliminates the need for the state to prove that the potential defendant knew or was unreasonable in the failure to recognize that the victim was under age fourteen, the statute may reasonably be expected to have some deterrent effect."[188] The majority, however, failed to realize that even with a mistake of fact defense, the state is not required to prove the potential defendant's knowledge, as the burden of establishing this affirmative defense would be placed upon the defendant.[189] Thus, if the majority truly believed what it asserted—that because the state does not have to prove intent for a crime, that crime is deterred—then allowing the defendant to present (and prove) a reasonable mistake of fact should not lessen the deterrent impact of the statute. Not only is the theory behind the majority's assertion—that because statutory rape has no mens rea requirement it deters would-be violators—dubious, but it is illogical. An individual who has no basis for believing he is engaging in unlawful conduct will not be deterred from engaging in that behavior.[190] Without any indication that his conduct was wrong, Owens had no reason to alter his conduct, and therefore could not possibly have been deterred.

Indicative of the disfavor in which strict criminal liability resides, the Model Penal Code states that, as a minimum requirement of cul-

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186. *See Garnett*, 332 Md. at 602, 632 A.2d at 812 (noting that the "lesser legal wrong theory does not provide a viable rationale for holding a defendant strictly liable for statutory rape where premarital sex is not criminal").

187. *Owens*, 352 Md. at 685, 724 A.2d at 54.

188. *Id.*

189. *See, e.g.*, Steve v. Alaska, 875 P.2d 110 (Alaska Ct. App. 1994) (finding a statute which places the burden of proof on a defendant to show reasonable mistake as to age in a statutory rape case by a preponderance of the evidence was not unconstitutional since the defendant's belief as to the victim's age was a matter of defense, not an element of the crime).

190. *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 427 (1993) (arguing that "the strict liability doctrine violates utilitarian theories of criminal punishment because an individual who has no basis for believing he is engaging in unlawful conduct will not be deterred from engaging in that behavior").

pability, a person is not guilty of a criminal offense unless he acts purposely, knowingly, recklessly, or negligently.[191] The Code also recognizes a defense of mistake of fact to negate mens rea for those defendants who have not acted out of criminal negligence.[192] In either case, the state must prove intent or provide the defendant an opportunity to demonstrate the absence thereof. The commentators to the Model Penal Code disapprove of statutory rape, as a strict liability crime, specifically because "the prosecutions often proceed even when the defendant's judgment as to the age of the complainant is warranted by her appearance, her sexual sophistication, her verbal misrepresentations, and the defendant's careful attempts to ascertain her true age."[193] The Model Penal Code commentary succinctly states the problem with statutory rape and other strict liability crimes: "[c]rimes does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable . . . this is too fundamental to be compromised."[194]

e. Inconsistency in the Adjudication of Strict Liability Offenses: Anderson v. State.—The weighty constitutional arguments that champion the necessity of a mistake of fact defense, have been inconsistently and incompatibly applied by the Maryland courts to the state's strict liability crimes. In *Anderson v. State*,[195] the Court of Appeals recently overturned the conviction of a defendant for carrying a concealed utility knife, "a strict liability offense," because the trial court failed to consider the *intended use* of the utility knife.[196] In *Anderson*, the applicable statute provided that a person who carries a concealed weapon shall be guilty of a misdemeanor and upon conviction shall be fined not more than $1000 or be imprisoned in jail for not more than three years.[197] The court reasoned that all knives are not dangerous or deadly weapons and that, depending on the circumstances, the concealed carrying of some cutting tools may be considered lawful.[198] The construction of this statute, which requires only an intent to carry

191. MODEL PENAL CODE § 2.02.

192. *Id.* § 2.04. The drafters of the Code implicitly concede that sexual conduct with a child of such extreme youth (the Model Penal Code applies strict liability for children under 10 years of age) would spring from a criminally negligent state of mind. Hence the mistake of fact defense does not apply here. *See* Comment § 213.6.

193. *See Garnett*, 332 Md. at 580, 632 A.2d at 801 (citing Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 106 (1965)).

194. MODEL PENAL CODE § 2.05 (comment) (emphasis added).

195. 328 Md. 426, 614 A.2d 963 (1992).

196. *Id.* at 444, 614 A.2d at 972.

197. *See* MD. ANN. CODE art. 27, § 36(a) (1996).

198. *See Anderson*, 328 Md. at 437, 614 A.2d at 968.

the instrument in a concealed fashion, looks only to the object's potential as a weapon, without considering the intended use of the "weapon."[199] When the court questioned the state on the status of other objects, such as a carpenter's hammer or a woman's hairpin, the state answered that criminally charging a person for the carrying of such items would be left to the exercise of the police officer's or prosecutor's discretion at the preliminary stages of the criminal process.[200] Thus, the prosecutor was able to consider the nature of the tool and the intent of its holder prior to the trial, but claimed that neither it nor the court were able to consider intent under the statute at trial. The Court of Appeals found that this raised procedural due process questions "concerning notice to the public of the conduct that is considered criminal," and concluded that "[a] construction of a statute which would cast doubt on its constitutional validity should be avoided."[201]

Two analogous characteristics of *Anderson* and *Owens* are worth noting. First, the majority in *Owens* stated that the defendant's assertion of reasonable mistake of fact regarding the victim's age is best considered as a mitigating circumstance at sentencing.[202] In *Anderson*, however, the same court claimed that a defendant's "intent" could not be used at the discretion of the prosecutor when determining whether or not to charge a person for carrying a concealed weapon.[203] In *Owens*, it appears that the court is simply employing the "intent" tool at a different stage of criminal prosecution (sentencing) and at the discretion of a different officer of the court (the judge). The *Anderson* court was unwilling to allow this discretion to substitute for intent at the charging stage in a criminal prosecution, yet the *Owens* court appears perfectly willing to allow a judge's discretion to substitute for a defendant's knowledge of a consenting partner's age *after the defendant has already been convicted.* If the discretion of a prosecutor prior to being charged for a misdemeanor offense was found to have been insufficient protection of due process rights, certainly the discretion of the judge after a defendant is convicted of a felony ought to be considered insufficient as well. This is particularly true when the stigma attached to and punishment for a felony is much harsher than those associated with a misdemeanor.

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199. *See id.*

200. *Id.* at 438, 614 A.2d at 968.

201. *Id.*

202. *Owens*, 352 Md. at 687, 724 A.2d at 55.

203. *Anderson*, 328 Md. at 438-39, 614 A.2d at 969.

Second, the *Anderson* court emphasized that "construction of a statute which would cast doubt on its constitutional validity should be avoided."[204] Intent in *Anderson* became an *element* of the crime through judicial construction in order to ensure the constitutionality of the statute, as notions of fundamental fairness and due process forced the court to read the element of mens rea into the crime.[205] By allowing a mistake of fact defense to statutory rape, intent becomes a factor to be considered by the jury, not an element of the crime to be established by the state. In this respect, both the constitutionality of the statute and the state's interest in protecting children can be preserved.[206]

f. Allowing a Mistake of Fact Defense will Distinguish the True Victims from the Self-made Victims.—Even if an actor takes all reasonable steps to ensure that the crime of statutory rape is not committed, a "victim" may still spout falsehoods upon which a reasonable person may rely. The victim in these circumstances becomes a victim by her own volition. As the California Supreme Court stated in *People v. Hernandez*, "if it occurs that [t]he [defendant] has been misled, we cannot realistically conclude that the intent with which he undertook the act suddenly becomes more heinous."[207] In *Owens*, the felonious act was induced by the fraudulent misrepresentation of a young woman.[208] Had the young woman—the very person for whom the government has gone to great lengths to protect—not contributed to the defendant's misperception, she might never have become a victim. Conversely, the defendant, who became one by a reasonable mistake of fact, is not a "socially dangerous individual who needs to be incapacitated or reformed."[209] Despite the absence of moral blame, the defen-

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204. *Id.* at 438, 614 A.2d at 968.

205. *See id.*

206. The assertion that mistake of fact must be made by judicial caveat is not necessarily meant to exclude action by the Legislature. However, if the Legislature fails to act, the Constitution of the United States and Maryland's Declaration of Rights impel the judiciary to accept its responsibility to protect a defendant's due process rights.

A mistake of fact defense is permitted in nearly half the states in the country today, and in many other countries around the world. *See* Levenson, *supra* note 190, at 435 (asserting that "other countries have reconciled more effectively the strict liability doctrine with general principles of moral culpability"). For example, Canada, Australia, New Zealand, and South Asian and African codified systems recognize a "good faith defense" to strict liability crimes, where a reasonable mistake of fact will exonerate common law and statutory offenses without discrimination. *See id.* at 435-49.

207. People v. Hernandez, 393 P.2d 673, 676 (Cal. 1964).

208. *Owens*, 352 Md. at 667, 724 A.2d at 45.

209. *See* Garnett v. State, 332 Md. 571, 579, 632 A.2d 797, 801 (1993) (citing WAYNE R. LAFAVE & AUSTING W. SCOTT, JR., CRIMINAL LAW 242-43 (2d ed. 1986)).

dant is now subject to the stigma of a criminal conviction which he, by law, must also broadcast to the community.

There is a need to reexamine the method by which victims are defined in criminal proceedings. Presently, the defendant bears the burden for the broad underlying assumptions about the neediness and inability to consent of the victim's class. In circumstances such as those that existed in *Owens*, the defendant, in theory becomes an unwitting victim of the judicial institution. By inducing the "criminal" act, the "technical victim" has simultaneously ensured that her partner will suffer among the most severe deprivations of liberty: a felony conviction without the presentation of a defense to the charges. Such deprivations remain anathema to the concepts of due process of law.

5. Conclusion.—A reasonable mistake of fact defense allows section 4463 to comport with both substantive due process, which requires defendants to possess some level of fault for criminal convictions, and procedural due process, which requires that the defendant have a fair opportunity to be heard. An affirmative defense reinserts mens rea into the strict liability crime of statutory rape, thus ensuring the culpability of those criminally punished in our judicial system. An affirmative defense, by definition, guarantees a defendant a fundamental due process right: the opportunity to be heard—the opportunity to present a defense. As the Maryland statute is currently interpreted and applied by the courts, this right is infringed not by a narrowly tailored means of protecting the government's interest, but by an overly broad suppression of a person's ability to speak in his own defense. A statute that irrebuttably presumes the guilt of the defendant and then renders him mute offends the traditional principles of justice and fair play that characterize American jurisprudence. This stifling of the defendant becomes even more reprehensible when considering the harsh penalties imposed upon him: potential imprisonment for up to twenty years and registration as a child sex offender for life. Despite the absence of moral blame, the defendant is now subject to the stigma of a criminal conviction which he must, by law, broadcast to the community. Without a mistake of fact defense, statutory rape prosecutions produce two entities: a 'victim,' only by legal definition and a convicted felon without culpability. In *Owens v. State*, the Court of Appeals exhibited a dereliction of duty by failing to recognize due process as a constitutional limit to legislative authority and failing to assume its constitutional responsibility to ensure that due process rights of the accused are not compromised.

MICHELLE R. VANYO

V. CONTRACTS

A. *The Invalidation of Collection Cost Provisions Under Maryland Law*

In *United Cable Television of Baltimore L.P. v. Burch*,[1] the Court of Appeals of Maryland held that in the absence of explicit statutory authority, any contractual provision charging a fee for the late payment of money owed is unenforceable if the amount charged is greater than a rate of six percent interest on the principal owed.[2] The court relied on Maryland cases and common law authorities to support its interpretation of the prejudgment interest rule as limiting damages for the unlawful withholding of money to the legal rate of interest on that sum.[3] The court, however, misinterpreted the pre-judgment interest rule as being a cap on damages for the breach of any obligation to pay a sum certain on a date certain, whereas it had previously interpreted the rule as being a gap-filler, applicable only to cases where parties had not previously agreed to a measure of damages. In addition, the court failed to recognize the numerous Maryland cases applying the collection cost rule, which stipulates that agreements to allocate collection costs to the breaching party as a separate element of damages are valid and enforceable. The court's misinterpretation of the prejudgment interest rule and failure to apply the collection cost rule will have the following negative consequences for Maryland businesses and consumers: (1) it is likely to increase the incidence of breach; (2) it will lead to higher prices for nonbreaching consumers; and (3) it potentially creates enormous liability for businesses that have charged late fees in the past.

1. The Case.—United Cable Television of Baltimore Limited Partnership (United) provides cable television service to approximately 112,000 residents of Baltimore City pursuant to written contracts.[4] In consideration for cable services,[5] each customer agrees to pay a subscription fee at the beginning of each month.[6] The written agreement between United and its customers also contains a clause

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1. 354 Md. 658, 732 A.2d 887 (1999).

2. *Id.* at 683-85, 732 A.2d at 900-01.

3. *See id.* at 668-81, 732 A.2d at 893-99 (discussing the Maryland cases and the other authorities that address the prejudgment interest rule).

4. *See id.* at 663-64, 732 A.2d at 889-90. United is a subsidiary of the Denver based cable franchisor, Telecommunications, Inc. (TCI) and does business as TCI of Baltimore. *See id.* at 662-63, 732 A.2d at 889.

5. Cable services provided by United include installing a cable connection to the customers' homes, loaning equipment to the customers, and transmitting programs to the customers' homes. *See id.* at 689, 732 A.2d at 904 (Chasanow, J., dissenting).

6. *See Burch*, 354 Md. at 663, 732 A.2d at 890.

that obligates customers to pay an administrative fee if they do not pay their bill by the due date.[7]

In November 1995, two customers of United, Louis Burch and Phillip Vincent, filed a class action on behalf of consumers subscribing to cable television service in Baltimore City, alleging that United's late fee was unlawful.[8] At the circuit court level, the primary issue was whether the late fee constituted a valid liquidated damages clause, or an unenforceable penalty.[9] United argued that the fee was proper because it was a reasonable advance estimate of the damages caused by a subscriber's failure to pay by the due date.[10] The evidence showed that customers who pay their bills late cause United to incur some costs associated with the collection process;[11] however, each party produced experts who gave conflicting opinions as to the actual amount of those costs.[12]

The trial judge held that fifty cents was a reasonable estimate of the actual damages caused by a subscriber's late payment.[13] Consequently, United's five dollar late fee was not a reasonable estimate of damages and was, therefore, an unenforceable penalty.[14] Accordingly, the trial court concluded that United was not entitled to four

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7. *See id.* at 664, 732 A.2d at 890. The clause states: "If you do not pay your bill by the due date, you agree to pay [United] an administrative fee for late payment. The administrative fee is intended to be a reasonable advance estimate of our costs which result from customers' late payments and non-payments." *Id.* The agreement also states that "the administrative fee is not interest, a credit service charge or a finance charge." *Id.* United increased this late fee from four dollars to five dollars in January 1993. *See id.* at 663, 732 A.2d at 890.

8. *See id.* at 662, 666, 732 A.2d at 889, 891. The plaintiffs brought their charges in four counts: (1) violation of the Maryland Consumer Protection Act (CPA), (2) violation of the common law of liquidated damages, (3) violation of the Maryland Uniform Commercial Code (UCC), and (4) breach of an implied covenant of good faith and fair dealing. Burch v. United Cable Television of Baltimore, No. 95311038/CL204287 (Cir. Ct. Balt. City Sept. 16, 1997).

9. *See Burch*, 354 Md. at 662, 732 A.2d at 889.

10. *See id.* at 667, 732 A.2d at 892. The court stated that "[t]he essence of United's position is that it is entitled to recover as damages six categories of late payment costs: (1) local office handling, mailing, and notification; (2) cost of funds; (3) data processing and billing; (4) field collections; (5) in-house/outside collection; and (6) bad debt." *Id.* (quoting Brief of Appellant at 14, United Cable Television v. Burch, 354 Md. 658, 732 A.2d 887 (1989) (No. 82)).

11. *See id.* at 665, 732 A.2d at 890-91. The evidence showed that at various stages in the collection process, United may incur the costs of mailing additional notices, placing phone calls, receiving phone calls, and sending technicians to the customers' residences. *See id.* If United is unable to collect an account, they write it off as bad debt and turn it over to a collection agency. *See id.*, 732 A.2d at 891.

12. *Id.* at 666, 732 A.2d at 891. United's expert calculated the cost per delinquent customer to be $16.14, while the Plaintiffs' expert calculated it to be thirty-eight cents. *Id.*

13. *Id.*

14. *Id.*

dollars and fifty cents of every five dollar late fee it collected, and entered judgement against United for $6,701,503.60 in excessive late fees, plus $897,015.11 in prejudgment interest.[15]

Subsequent to this decision, United appealed the judgement for excess late charges and the award of attorneys' fees to the Court of Special Appeals.[16] However, the Court of Appeals issued a writ of certiorari sua sponte before the intermediate appellate court considered the appeal.[17]

2. *Legal Background.*—Under Maryland law, the parties to a contract may agree to stipulate damages for breach of contract.[18] *Taylor v. Grafton*[19] establishes the circumstances under which such a liquidated damages clause is valid. To be enforceable, a liquidated damages clause must identify a specific sum of money that is a reasonable advance estimate of anticipated damages, which are incapable of exact ascertainment at the time of contract formation.[20]

With respect to the breach of an obligation to pay money, the prejudgment interest rule and the collection cost rule determine which costs may be included in the calculation of damages. The prejudgment interest rule establishes that interest at the legal rate on the

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15. *Id.* Prejudgment interest was calculated as simple interest at a rate of six percent per year. *Id.* The trial court ordered United to pay the entire $7,598,518.71 judgment into a "common fund." Burch v. United Cable Television of Baltimore, No. 95311038/CL204287, at 5 (Cir. Ct. Balt. City Nov. 26, 1997). The court then established a plan for paying the award of attorneys' fees, litigation expenses, and two awards to Plaintiffs Burch and Vincent out of the fund. *Id.* The remainder constituted a "Refund Fund" out of which restitution to class plaintiffs was to be made. *Id.*

16. *Burch*, 354 Md. at 667, 732 A.2d at 892.

17. *Id.*

18. *See infra* note 3 and accompanying text (discussing Maryland law pertaining to liquidated damages).

19. 273 Md. 649, 332 A.2d 651 (1975).

20. *Id.* at 663, 332 A.2d at 661. The court stated that

> where the parties, at or before the time of execution of the contract, agree upon and name a sum therein to be paid as liquidated damages in lieu of anticipated damages which are in their nature uncertain and incapable of exact ascertainment, that the amount so named in the agreement will be regarded as liquidated damages, not as a penalty, unless the amount so agreed upon and inserted in the agreement be grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract. And whether the damages are incapable of exact ascertainment should be determined from the subject-matter of the contract considered in light of all the surrounding facts and circumstances connected therewith and known to the parties at the time of its execution.

Id. (citations omitted).

sum owed is recoverable as a matter of right.[21] The collection cost rule establishes that parties may agree to allocate collection costs, including attorneys' fees, to the party who breaches their payment obligation.[22] If the courts have modified these rules in any respect since they first applied them over one hundred years ago, it was only to broaden their scope by applying them to payment obligations arising out of different types of contracts.

The Court of Appeals applied the prejudgment interest rule in *Brown v. Hardcastle*.[23] The defendant in *Brown* failed to make timely mortgage payments.[24] Under the terms of the mortgage agreement, he paid interest at a rate of one percent per year.[25] The agreement did not contain a provision stipulating the rate of interest to be charged in the event that the borrower failed to pay on time.[26] The court held that in the absence of an express agreement regarding the rate of interest on default payments, the law sets the measure of interest at the legal rate of six percent per year.[27] The court reasoned that this was the correct measure of damages because it reflected the exact loss sustained by the plaintiff.[28]

Three years later, in *Bowie v. Hall*,[29] the Court of Appeals enunciated the collection cost rule. The court considered whether the measure of damages for breach of a similar obligation to pay money could be greater than the legal rate of six percent interest.[30] The *Bowie* court held that it could, recognizing that parties are free to enter into contracts as long as they are not contrary to the law or to public pol-

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21. *See* Winder v. Diffenderffer, 2 Bland 166, 204 (1829) (stating that "[l]egal interest is the measure of damages which the law allows in *all* cases for the [unlawful] detention of money" (emphasis added)); Brown v. Hardcastle, 63 Md. 484, 491-92 (1885) (holding that in the absence of an express agreement otherwise, the appropriate measure of damages for default payments is the sum owed plus interest at the legal rate).

22. *See* Bowie v. Hall, 69 Md. 434, 435-36 (1888) (recognizing the validity of a contract clause that allocated collection costs, including attorneys' fees, to a party who breached his obligation to pay a sum certain on a date certain).

23. 63 Md. 484 (1885).

24. *See id.* at 486.

25. *See id.* at 492.

26. *See id.*

27. *See id.* at 491-92 ("[T]he weight of best authorities is, we think, decidedly in favor of making interest on overdue instruments to run at the legal rate, after due and unpaid.").

28. *See id.* at 491.

29. 69 Md. 433, 16 A. 64 (1888).

30. *Id.* at 434, 16 A. at 64. The agreement at issue in *Bowie* stipulated that if payment was not received at maturity, the debtor agreed to pay all expenses involved in collecting the payment, including attorneys' fees. *Id.*

icy.[31] The court determined that the provision at issue did not "violate . . . [any] principle of law or public policy" because it "contain[ed] no element of oppression to the borrower."[32] Furthermore, the court determined that the allocation of collection costs to the breaching party was not contrary to the law or public policy against usury because it only allowed the lender to recover his principal with legal interest, but nothing more.[33] In evaluating whether the provision was usurious, the court considered the net sum of money received by the lender, not the total sum paid by the breaching party.[34]

Maryland courts have applied both the prejudgment interest rule and the collection cost rule without significant modification since their inception.[35] The only apparent modifications by the courts have been to broaden their scope by applying them to cases where the breached obligation arises out of different types of contracts.[36]

One example of the broadened scope of the prejudgment interest rule is *Atlantic States Construction Co. v. Drummond & Co.*,[37] in which the Court of Appeals applied the rule to a payment obligation arising under a construction contract. In that case, Drummond & Company (Drummond) provided paving services under a subcontract to Atlantic States Construction Company (Atlantic), which was a general contractor to the owner, Laurel Plaza.[38] The subcontractor agreement provided that payment was due to Drummond from Atlantic thirty days after completion of the work, acceptance by the architect and owner, and full payment by the owner to Atlantic.[39] Laurel Plaza, however, went bankrupt before approving the subcontractor's work.[40]

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31. *Id.* at 435, 16 A. at 65 ("Parties have the right to make their contracts in what form they please, provided they consist with the law of the land; and it is the duty of the courts so to construe them, if possible, as to maintain them in their integrity and entirety.").

32. *Id.*

33. *Id.* at 435-36, 16 A. at 65.

34. *Id.* (stating that the effect of the provision was "clearly not to put any money above the legal rate of interest into the pocket of the lender").

35. *See, e.g.*, Atlantic States Constr. Co. v. Drummond & Co., 251 Md. 77, 246 A.2d 251 (1968); Eidelman v. Walker Dunlop, 265 Md. 538, 290 A.2d 780 (1972); Gaither v. Tolson, 84 Md. 637, 36 A. 449 (1897); Noyes Air Conditioning Contractors v. Wilson Towers Ltd. Partnership, 122 Md. App. 283, 712 A.2d 126 (1998).

36. *See, e.g., Atlantic States*, 251 Md. at 78, 246 A.2d at 252 (construction contract); *Eidelman*, 265 Md. at 539, 290 A.2d at 781 (commercial lease); *Gaither*, 84 Md. at 642, 36 A. at 450 (mortgage); *Noyes Air*, 122 Md. App. at 286, 712 A.2d at 127 (contract for the sale of goods and services).

37. 251 Md. 77, 246 A.2d 251 (1968).

38. *See id.* at 78, 246 A.2d at 252.

39. *See id.* at 79, 246 A.2d at 252.

40. *See id.*

Nevertheless, the Court of Appeals held that Atlantic bore the risk of the owners insolvency and held that because Drummond had completed the work, and it had been accepted by the architect prior to the owner's insolvency, the subcontractor's payment was due thirty days after the owner's insolvency.[41] The court then applied the prejudgment interest rule and held that Drummond was entitled to legal interest on the sum owed beginning thirty days after the owner became insolvent.[42]

Eidelman v. Walker & Dunlop[43] provides another example of the broadened application of the prejudgment interest rule. In *Eidelman*, the defendant's payment obligation arose from his status as a guarantor on a lease of commercial real estate.[44] The lease provisions included an eight-year term, with a monthly rent of seven hundred dollars, payable in advance.[45] The lessee operated a drugstore on the property, but the business failed approximately four years into the lease period, and the lessee subsequently stopped paying the monthly rent.[46] The *Eidelman* court applied the prejudgment interest rule, stating that "[i]nterest is recoverable as of right upon contract to pay money on a day certain"[47] and that "[s]ums payable as rent come within this holding and a landlord is entitled to interest on rent from the day it becomes due and payable."[48] Thus, the *Eidelman* court further broadened the application of the prejudgment interest rule by including an obligation arising under a commercial real estate lease within the ambit of the rule.

With respect to the collection cost rule, the Court of Appeals has similarly preserved the substance of the rule while expanding its application by applying it to payment obligations that have arisen out of various types of contracts. For example, in *Gaither v. Tolson*,[49] the Court of Appeals applied the collection cost rule to validate a cove-

41. *See id.* at 83, 246 A.2d at 254 (citing Dyer v. Bishop, 303 F.2d 655 (6th Cir. 1962)).

42. *Id.* at 85, 246 A.2d at 255 ("If the contractual obligation be unilateral and is to pay a liquidated sum of money at a certain time, interest is almost universally allowed from the time payment is due." (quoting Affiliated Distillers v. R.W.L. Wine & Liquor, 213 Md. 507, 516, 132 A.2d 582 (1987))).

43. 265 Md. 538, 290 A.2d 780 (1972).

44. *Id.* at 539, 290 A.2d at 781.

45. *Id.* at 539-40, 290 A.2d at 781-82.

46. *Id.* at 540, 290 A.2d at 782.

47. *Id.* at 545, 290 A.2d at 784 (citing Isle of Thye Lard Co. v. Whisman, 262 Md. 682, 279 A.2d 484 (1971); St. Paul v. Manufacturers Life Ins., 262 Md. 192, 278 A.2d 12 (1971); A. & A. Masonry v. Polinger, 259 Md. 199, 269 A.2d 566 (1970); City Pass Ry. v. Sewell, 37 Md. 433 (1873)).

48. *Id.* (citing Brown v. Bradshaw, 245 Md. 524, 226 A.2d 565 (1967); Dennison v. Lee, 6 G. & J. 383 (1833)).

49. 84 Md. 637, 36 A. 449 (1897).

nant in a mortgage to pay all costs and attorneys' fees incurred in the collection of the underlying debt.[50] The mortgagor in this case, James Cockey, was forced to sell the mortgaged property to pay the debt.[51] The sale was arranged by the mortgagee, Thomas Gaither, who, for purposes of making the sale, assigned the mortgage to George Gaither.[52] Upon sale of the land, the auditor allowed $402 in trustees' commissions for conducting the sale, and attorney's commissions in the amount of $377 for earlier attempts to collect on the debt.[53] Mary Tolson, the holder of a second mortgage, challenged the validity of the covenant allowing attorneys' fees.[54] The *Gaither* court, citing *Bowie*, held that the covenant to pay attorneys' fees was valid.[55] The court explained that the obligation to pay was one of the mutual obligations arising between the parties at contract formation.[56]

In addition, the Court of Special Appeals recently applied the collection cost rule to a contract for the sale and installation of air conditioning equipment in *Noyes Air Conditioning Contractors v. Wilson Towers Limited Partnership*.[57] In *Noyes Air*, the electric utility company, PEPCO, had offered rebates to customers who replaced old equipment with more energy efficient equipment.[58] Wilson Towers agreed to pay Noyes, an air conditioning contractor, $82,750 minus the amount of PEPCO's rebate in consideration for installing new energy efficient equipment in Wilson's apartment complex.[59] The dispute arose because the actual rebate was less than the estimate included in the contract.[60] The trial court held that Wilson was liable for the full contract price, despite the fact that the actual rebate was less than originally expected.[61] Despite the fact that the contract also provided for a one and one-half percentage (1½%) finance charge per month on past due accounts and all reasonable collection fees, attorney's fees and court costs, the trial judge refused to award interest and costs to Noyes.[62] The Court of Special Appeals reversed the decision regard-

50. *Id.* at 642, 36 A. at 450.
51. *See id.* at 638, 36 A. at 449.
52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.* (citing Bowie v. Hall, 69 Md. 434, 435 (1888)).
56. *See id.* at 639, 36 A. at 449-50.
57. 122 Md. App. 283, 712 A.2d 126 (1998).
58. *Id.* at 286, 712 A.2d at 127.
59. *See id.*
60. *See id.* at 288, 712 A.2d at 128.
61. *Id.*
62. *Id.*

ing the award of attorney's fees, interest and costs.[63] The intermediate appellate court explained that the trial court did not have the discretion to "alter the terms of a written contract, executed in good faith by knowledgeable parties, establishing as a matter of right the liability for costs, attorney's fees, and interest in case of default by one of the parties."[64] The court added that although a trial court retained the discretion to decide what constituted a reasonable award of attorney's fees, costs, and interest "the court may not alter the terms of the contract agreed to by the parties by denying either party the benefit of the agreement."[65] This holding broadens the type of payment obligation covered by the collection cost rule as it applies the rule to a contract for the sale of labor and equipment.[66] *Noyes* also clarifies that the 0.5% per month legal rate of interest is not a maximum measure of damages as the court upheld the provision charging one and one-half percent interest per month on overdue payments.[67] Accordingly, *Noyes* affirmed the collection cost rule, which enforces agreements to liquidate damages, regardless of whether they allow damages above the legal rate of interest.[68]

3. The Court's Reasoning.—In *United Cable Television v. Burch*, the Court of Appeals affirmed a $7,598,518.71 judgement against United Cable, holding that the measure of damages for a contract to pay money was limited to the amount promised plus interest at the legal rate.[69]

The majority[70] began its opinion by noting that there are two types of prejudgment interest—discretionary and of right—and that "[b]oth versions are 'in the nature of an element of damages.'"[71] The court further explained that "[t]he ordinary rule in contract cases, if the contract requires payment of a sum certain on a date certain, is

63. *Id.* at 291, 712 A.2d at 130.

64. *Id.*

65. *Id.* at 292, 712 A.2d at 130.

66. *See id.* at 286, 712 A.2d at 127 (indicating the agreement was for the sale and installation of air conditioning equipment).

67. *Id.* at 288, 712 A.2d at 129.

68. *See id.*

69. *Burch*, 354 Md. at 688, 732 A.2d at 892. The judgment included damages in the amount of $6,701,503.60 and prejudgment interest calculated at 6% per year in the amount of $897,015.11. *Id.* at 666, 732 A.2d at 891.

70. The majority opinion was authored by Judge Rodowsky, and joined by Bell, Eldridge, Raker, Wilner, and Cathell. *Id.* at 661, 732 A.2d at 889.

71. *Id.* at 668, 732 A.2d at 892 (quoting Maryland State Highway Admin. v. Kim, 353 Md. 313, 327, 726 A.2d 238, 245 (1999)).

[that] prejudgment interest typically is allowed as a matter of right."[72] The court then noted that the critical rule, recognized by a number of authorities, was that "[w]here the contract or obligation is for the payment of a definite sum of money[,] *the measure of damages* is the amount of money promised to be paid, with legal interest, the allowance of interest being [a] matter of legal right."[73] Therefore, according to the *Burch* court, damages for a breach of contract to pay money is limited to the lawful rate of interest.[74]

Having established its view that damages for breach of a payment obligation are limited to legal interest, the *Burch* court explained two effects that the rule has on liquidated damages clauses.[75] First, the majority explained the common law rule that in an agreement to pay a larger sum upon the failure to pay a smaller sum, the larger sum is a penalty and not enforceable as liquidated damages.[76] This rule, however, does not invalidate any agreement to charge legal interest on the sum for the duration of a default period because legal interest is the upper bounds of damages allowed.[77] Second, the *Burch* court reiterated the rule that in order to constitute a valid liquidated damages clause, the anticipated damages must be "uncertain and incapable of exact ascertainment."[78] The majority reasoned that because the common law provides a formula for calculating damages for breach of a contract to pay money, such as the contract here, those damages are both certain and capable of exact ascertainment.[79]

The *Burch* court then asserted that there was no independent statutory basis for enforcing United's five dollar late fee.[80] Although the court recognized that there are a number of Maryland statutes "that,

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72. *Id.* at 669, 732 A.2d at 893 (internal quotation marks omitted) (alterations in original) (quoting Crystal v. West & Callahan, Inc., 328 Md. 318, 343, 614 A.2d 560, 572 (1992)).

73. *Id.* (internal quotation marks omitted) (alterations in original) (quoting 1 J.P. POE, PLEADING AND PRACTICE IN THE COURT OF LAW IN MARYLAND § 584C, at 608 (5th Tiffany ed. 1925)).

74. *Id.* at 671, 732 A.2d at 894.

75. *Id.* at 672-75, 732 A.2d at 894-96.

76. *Id.* at 672, 732 A.2d at 894 (quoting Geiger v. Western Maryland R.R. Co., 41 Md. 4, 15 (1874)).

77. *See id.* at 674, 732 A.2d at 896 (quoting J.G. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 311, at 970-71 (4th ed. 1916)).

78. *Id.* (internal quotation marks omitted) (quoting Anne Arundel County v. Norair Eng'g Corp., 275 Md. 480, 492, 341 A.2d 287, 293 (1975)).

79. *Id.* at 675, 732 A.2d at 896.

80. *See id.* ("[T]here is no statute in Maryland, applicable to United's accounts with its subscribers, that alters the common law rule described [earlier in the opinion].").

in various ways, acknowledge the imposition of late charges,"[81] it reasoned that these statutes, viewed against the common law rule, "permit that which would otherwise be unpermitted" rather than "regulating that which is permitted, but otherwise would be unregulated."[82] Therefore, because these statutes do not expressly "authoriz[e] or regulat[e] United's late charge," the court held that the late charge would continue to be subject to the common law rule restricting damages to the legal rate of interest.[83]

Having established its view that in the absence of explicit statutory authority, United's late fees are limited by the Maryland common law rule, which caps damages for late payment at the legal rate of interest, the *Burch* court discussed three potential reasons for declining to follow this rule.[84] First, the court noted that a number of decisions from other jurisdictions, and at least one from the Maryland Court of Special Appeals, have concluded that late charges are not penalties, but contribute instead "reasonable compensation in commercial transactions."[85] The *Burch* court also recognized two policy arguments in favor of allowing late charges: (1) invalidating late charges would only cause a company to spread the cost of collecting on delinquent accounts to all its customers rather than assessing them against those who are responsible for the increased costs, and (2) the costs incurred in collecting on delinquent accounts exceed a six percent per annum interest on those accounts.[86] Nevertheless, the court refused to be swayed by these arguments, explaining that "the Maryland common law rule of damages for the breach of a contract to pay money should not be changed by judicial decision."[87]

The *Burch* court justified its refusal to change the common law rule based on the nexus between that rule and the Maryland Constitution, which sets the lawful rate of interest at six percent per year.[88]

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81. *Id.* The court divided these statutes into four "classes." *Id.* Those of the first class "regulate the amount and timing of a late charge." *Id.* The statues labeled as class two also regulate the amount and timing of late charges, but additionally, expressly state that such late charges are not interest. *See id.* at 676-77, 732 A.2d at 897. Those of the third class authorize late charges "without fixing any maximum late charge." *Id.* at 677, 732 A.2d at 897. Finally, the fourth class of statutes "simply recognize that late charges, or late charges permitted by law, may in fact be assessed." *Id.* at 678, 732 A.2d at 898.

82. *Id.* at 680, 732 A.2d at 899.

83. *Id.* at 681, 732 A.2d at 899.

84. *See id.* at 681-82, 732 A.2d at 899-900.

85. *Id.* at 682, 732 A.2d at 900 (internal quotation marks omitted) (quoting Mattividi Assocs. L.P. v. NationsBank of Virginia, N.A., 100 Md. App. 71, 91, 639 A.2d 228, 238 (1994)).

86. *See id.*

87. *Id.*

88. *Id.* (citing MD. CONST. art. III, § 57).

The majority reasoned that since the interest-only rule is tied to the Maryland Constitution, any court-instituted change to that rule would "have the same effect as judicially changing the Constitution or as judicially enacting a statute that has not been enacted by the General Assembly."[89]

The *Burch* court then held that United's five dollar late fee was an unenforceable penalty, reasoning that "because United's damages are fixed by common law to an easily determined amount, United's attempt to increase the damages by a liquidated damages provision produces a penalty."[90] The court, however, made it clear that this decision was not meant to "intimate [any] opinion on whether late charges in other types of transactions . . . are or are not interest."[91] Therefore, using an estimated monthly charge of twenty dollars, the court calculated the maximum monthly damages to be ten cents per delinquent account.[92]

In the lone dissenting opinion, Judge Chasanow criticized the majority for deciding the case on the issue of permissible damages without giving either party an opportunity to brief or to argue that issue.[93] Judge Chasanow then characterized the contract at issue as a contract for services that was in no way a loan of money.[94] He argued that most of the authorities cited by the majority, including Section 57 of Article III, were not applicable because they were limitations on usury.[95] Judge Chasanow argued that usury laws apply to loans, forbearance, and similar transactions, but not to sales.[96] He then argued that United's agreement was not subject to usury laws because it was a sales agreement under which the customer was given the option of paying a cash or credit price.[97] Judge Chasanow explained that when the customer uses the service before paying for it, United charges them an additional five dollars for extending credit, and that such

89. *Id.* at 683, 732 A.2d at 900.

90. *Id.* at 685, 732 A.2d at 901.

91. *Id.*

92. *Id.*, 732 A.2d at 901-02. The court also considered the issue of the circuit court's award of attorney's fees to the plaintiffs. *Id.* at 685-88, 732 A.2d at 902-03. This issue, however, is beyond the scope of this Note.

93. *Id.* at 689, 732 A.2d at 903-04 (Chasanow, J., dissenting) (stating that "[t]he majority opinion may be a good example of why appellate courts should not decide cases on issues neither briefed nor argued by parties").

94. *Id.* at 689-90, 732 A.2d at 904 (stating that "it is indisputable that the contracts require pre-payment for cable service and use of cable equipment and are not in any way loans of money to the customers by United").

95. *Id.* at 690, 732 A.2d at 904.

96. *Id.*

97. *Id.*

cash or credit transactions did not violate usury laws because they were a sale and not a loan of money.[98]

The dissent then identified two elements of damages that United should have been allowed to recover.[99] First, United should have been permitted to recover collection costs because the Court of Appeals had never before held that a promise to pay reasonable costs of collection was void or capped by the legal rate of interest.[100] As Judge Chasanow noted, "United presented an abundance of evidence, not refuted or rejected by the majority, that its collection costs were reasonable and necessary because of the nature of its business."[101] The dissent faulted the majority for not explaining why collection costs were not allowed as a separate element of damages.[102] Second, the dissent argued that the court should have permitted damages for the "special injury" resulting from the customers' retention of United's cable boxes and other equipment.[103] Judge Chasanow relied on the rule of usury law that if the promisee has some special injury beyond the loss of the use of money, a liquidated damages provision was not unenforceable if it provides damages in excess of the permissible interest on the sum.[104] The dissent would have allowed damages for retention of equipment because the customers' retention of equipment in this case caused a "special injury" under this rule.[105]

Judge Chasanow concluded his dissent by warning that the majority's interpretation of the law may have "significant implications."[106] He explained that under the majority approach, the maximum allowable late fee is six percent per year, unless the legislature enacts an explicit statute to the contrary.[107] Judge Chasanow predicted that "there are [a] great number[ ] of contracts that may be rendered usurious by the majority opinion, and class action lawyers will have vast new vistas to explore."[108] Judge Chasanow also noted that continu-

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98. *Id.* (citing Falcone v. Palmer Ford, 242 Md. 487, 219 A.2d 808 (1966)).

99. *Id.* at 692, 732 A.2d at 905.

100. *See id.* at 693, 732 A.2d at 905-06 ("Contractual attorney's fees and court costs are forms of permissible collection costs and have not been limited by the amount of permissible interest, even with loan transactions regulated by the usury laws.").

101. *Id.*, 732 A.2d at 906.

102. *Id.*

103. *Id.* at 693-94, 732 A.2d at 906.

104. *Id.* (citing 5 A.L. CORBIN, CORBIN ON CONTRACTS § 1065, at 374-75 (1964)).

105. *Id.* at 694, 732 A.2d at 906.

106. *Id.*

107. *See id.*

108. *Id.*

ously computing late fees of .5% per month would present a challenge to companies.[109]

4. Analysis.—The *Burch* court disrupted Maryland's well-established law of contract damages by modifying the prejudgment interest rule and overruling the collection cost rule.[110] These disruptions are not justified because the court misinterpreted the former and wrongly ignored the latter. Furthermore, this opinion is detrimental to Maryland businesses and consumers for the following three reasons: (1) it is likely to increase the incidence of breach; (2) it will lead to higher prices for nonbreaching consumers; and (3) it potentially creates enormous liability for businesses that have charged late fees in the past.

a. The Court Misinterpreted the Prejudgment Interest Rule and Wrongly Ignored the Collection Cost Rule.—Prior to *Burch*, the prejudgment interest rule and collection cost rule provided a framework for calculating damages for the breach of an obligation to pay a specific sum of money on a specific date. The prejudgment interest rule provided that interest was allowed as a matter of right as an element of damages for such a breach.[111] Maryland courts applied this rule as a gap-filler, to provide a measure of damages in cases where the parties did not otherwise agree to one before the breach.[112] The collection cost rule provided that the nonbreaching party could also recover collection costs as a separate element of damages in cases where both parties agreed to that stipulation prior to the breach.[113] The *Burch* court replaced this framework with the rule that damages for the breach of an obligation to pay a sum certain on a date certain are always limited to the sum owed plus interest at the legal rate.[114]

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109. *Id.*

110. *See infra* section 4.a.

111. *See supra* note 21.

112. *See Brown*, 63 Md. at 491-92 (awarding legal interest for default on mortgage payments where the parties' agreement did not stipulate any damages for the borrower's failure to make timely payments); *see also* Eidelman v. Walker & Dunlop, 265 Md. 538, 545, 290 A.2d 780, 784 (1972) (awarding legal interest as damages for nonpayment of rent under commercial lease that included no term stipulating damages for late payment); Atlantic States Constr. Co. v. Drummond & Co., 251 Md. 77, 85, 246 A.2d 251, 255 (1968) (awarding legal interest as damages for nonpayment under construction contract that included no provision stipulating damages).

113. *See supra* note 22 and accompanying text (explaining the origins of the collection cost rule).

114. *Burch*, 354 Md. at 668-73, 732 A.2d at 892-95 (explaining the court's interpretation that interest is the only measure of damages for breach of an obligation to pay a sum certain on a date certain).

The *Burch* court correctly stated the prejudgment interest rule—that in cases where a party breaches an obligation to pay a sum certain on a date certain, interest is allowed as a matter of right.[115] The majority, however, incorrectly interpreted the prejudgment interest rule to *limit* damages to the sum owed plus interest. The court relied on *Brown* to support its interpretation that, under Maryland law, the correct measure of damages is the sum owed plus interest, and nothing more.[116] *Brown*, however, does not support this proposition for two reasons. First, in *Brown*, the only element of damages that the appellant sought was the sum owed plus interest.[117] In *Burch*, however, the cable company incurred collection costs in addition to losses associated with the time value of money.[118] Assuming *arguendo* that *Brown* limits damages associated with the time value of money to the sum owed plus interest at the legal rate, the *Burch* court still failed to show how this justifies limiting other elements of damages to anything other than their actual cost. The second reason that *Brown* does not support the *Burch* court's interpretation is that the issue in the *Brown* case concerned the proper method of calculating damages in the absence of an agreement stipulating damages,[119] whereas the issue in *Burch* involved the enforceability of such an agreement.[120] The *Brown* court recognized that the legal right to damages can come from either the terms of the contract, or in the absence of such terms, from state law.[121] The *Brown* court held, in a case involving the right to damages based on state law rather than the terms of a contract, that the correct

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115. *Id.* at 668-69, 732 A.2d at 893 (recognizing that "[t]he ordinary rule in contract cases, if the contract requires payment of a sum certain on a date certain, is [that] prejudgment interest is typically allowed as a matter of right." (internal quotation marks omitted) (quoting Crystal v. West & Callahan, Inc., 328 Md. 318, 343, 614 A.2d 560, 572 (1992))).

116. *See id.* at 670, 732 A.2d at 893 (stating that *Brown* applied the rule that damages for contracts to pay money are limited to the legal rate of interest).

117. *See Brown*, 63 Md. at 485 (stating that the appellant's prayer for relief consisted of the sale of real estate for payment of a mortgage debt, without any claim for consequential damages).

118. *See Burch*, 354 Md. at 667, 732 A.2d at 892 (listing the following categories of costs incurred as a result of breach: mailings, phone calls, and site visits).

119. *See Brown*, 63 Md. at 492 (stating that the mortgage agreement stipulated that "interest at one percent was to be paid until the principal became due, and is silent as to the rate after due").

120. *See Burch*, 354 Md. at 668, 732 A.2d at 893 (identifying the provision in the agreement between United and its customers as a contractual liquidated damages provision).

121. *See Brown*, 63 Md. at 491-92 (citing Brewster v. Wakefield, 22 How. 127 (1859) for the proposition that a creditor is entitled to interest by operation of law when the contract does not specify a rate of interest due in the event of late payment).

measure of damages is the sum owed plus interest at the legal rate.[122] This holding dealt specifically with damage claims based on state law, and thus, has no bearing whatsoever on damage claims based on the terms of freely negotiated contracts.[123]

The *Burch* court also relied on *Loudon v. Taxing Dist. of Shelby County*[124] to demonstrate that its interpretation was consistent with the common law rule that damages for breaching a contract to pay money are limited to the legal rate of interest.[125] In that case, the United States Supreme Court held that a contractor's damages were limited to interest, stating that "[t]he law assumes that interest is the measure of all such damages."[126] As the *Brown* court made clear, however, the measure of damages provided by the law is relevant only where the terms of the contract do not provide for a measure of damages.[127] Thus, *Loudon* is inapposite because it concerned a situation where there was no prior agreement to stipulate damages, whereas the parties in *Burch* agreed to a measure of damages.[128]

In addition to misinterpreting the prejudgment interest rule, the *Burch* court wrongly ignored the collection cost rule.[129] The court, acting *sua sponte*, raised the issue of whether United was permitted to recover collection costs as an element of damages.[130] It then dismissed the issue by simply stating that United "[was] not entitled to prove costs of collection as damages."[131] The majority, however, never explained why collection costs should not be permitted as an element of damages.[132] Since *Bowie v. Hall* in 1888, Maryland courts have per-

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122. *See id.* at 491 (stating that "the weight of best authorities is, we think, decidedly in favor of making interest on overdue instruments to run at the legal rate, after due and unpaid").

123. *See id.* at 491-92 (explaining that when an agreement is silent on the matter of interest rates during a period of default, state law establishes that the proper measure of damages is interest at the legal rate during the period of default).

124. 104 U.S. 771 (1881).

125. *See Burch*, 354 Md. at 670, 732 A.2d at 893-94.

126. *Loudon*, 104 U.S. at 774.

127. *See supra* notes 122-123 and accompanying text.

128. *See Loudon*, 104 U.S. at 744 (noting that the contract at issue provided only that payment would be made in the form of bonds).

129. *See Burch*, 354 Md. at 693, 732 A.2d at 905-06 (Chasanow, J., dissenting) (noting that the Court of Appeals "has never before held that a promise to pay reasonable costs of collection is void or limited to the amount of permissible interest on the payment").

130. The issue on appeal was whether the five dollar late fee was a reasonable estimate of damages, and not whether United was entitled to recover collection costs as an element of damages. *See Burch*, 354 Md. at 667, 732 A.2d at 892.

131. *Id.*

132. *See id.* at 693, 732 A.2d at 906 (Chasanow, J., dissenting) (stating that "[t]he majority fails to [explain] why the contractual agreement to pay costs of collection is impermissible").

mitted collection costs as an element of damages in cases where parties have agreed to liquidate those damages prior to the breach.[133] The court did not attempt to distinguish the provision in *Burch* from those in previous collection cost cases; rather, the court ignored the line of collection cost cases altogether.[134] By not addressing *Bowie* and its progeny, the court implicitly overruled that line of cases.

b. United v. Burch *is Bad for Maryland Businesses and Consumers.*—Not surprisingly, the *Burch* court's misinterpretation of the prejudgment interest rule and its apparent rejection of the collection cost rule will be detrimental to Maryland businesses and consumers. The rule adopted by the court limiting damages on contracts to pay money to the legal rate of interest will have an extremely broad impact, considering that most contracts include a term requiring payment of a sum certain on a date certain.[135] As a matter of policy, this rule is troublesome because (1) it is likely to increase the occurrence of contractual breaches; (2) it will lead to higher prices for nonbreaching consumers; and (3) it potentially creates enormous liability for businesses that have charged late fees in the past.

All sellers of goods and services will run the risk of becoming unwilling creditors under this rule.[136] Any buyer who breaches a payment obligation is liable only for the balance owed plus interest at six percent per year.[137] Therefore, a buyer might be encouraged to withhold payment if he could get a higher rate of return on the money elsewhere.[138] In effect, this rule gives every buyer the option of paying for goods and services when payment is due, or paying down the balance as if it were a loan with an indefinite term and a fixed annual rate of six percent interest.[139] Therefore, this law is detrimental to

133. *See Bowie*, 69 Md. at 435-36 (recognizing the validity of a contract clause that allocated collection costs, including attorneys' fees, to a party who breached his obligation to pay a sum certain on a date certain).

134. Nowhere in its decision did the *Burch* majority refer to any of the cases in Maryland that have dealt with the validity of collection cost provisions in contracts.

135. *See* Maryland Chamber of Commerce's Memorandum of Law in Support of Reconsideration or Clarification of June 8, 1999 Opinion at 5, United Cable Television of Baltimore L.P. v. Burch, 354 Md. 658, 732 A.2d 887 (1999) (No. 82) (noting that "virtually *every* contract requires one party or the other or both to pay money").

136. *Id.* at 11 (arguing that "as consumers discover that, by refusing or delaying to make payment, they can cause unwitting sellers to become involuntary creditors—limited to collecting a maximum interest rate of six percent on the unpaid balance").

137. *See id.*

138. Of course, a buyer might also consider the value of the continued business relationship of the seller in deciding whether or not to pay on time.

139. In an amicus brief, the Telecommunications Association of Maryland, Delaware, and the District of Columbia also argued that as a result of this rule, cable service providers

sellers because it is likely to cause buyers to breach payment obligations more frequently.

This new interpretation of the law also forces sellers to reallocate costs in a less efficient manner, which includes charging higher prices to nonbreaching parties. *Burch* prohibits sellers from allocating collection costs to the parties who breach their payment obligations.[140] Collection cost provisions promote efficiency because they internalize the cost of breach within the group of customers who are best able to avoid the harm resulting from breach.[141] Sellers who can not recover collection costs from breaching parties will spread those costs among all customers, regardless of whether they meet their payment obligations.[142] Therefore, the court's rule in this case will cause near-term and long-term price increases for nonbreaching consumers. In the near-term, nonbreaching customers will incur a price increase equal to a pro rata share of the current total cost of collecting delinquent accounts. In the long-term, the nonbreaching customers' pro rata share will continue to increase because the total cost of collecting delinquent accounts will rise as a result of the higher frequency of breach.

The *Burch* decision threatened to expose many Maryland businesses to enormous unforeseen liability for the past over-collection of late fees.[143] This threat arises from the fact that the *Burch* court fundamentally changed the law of damages while asserting that its interpretation has been the law in Maryland since 1851.[144] Prior to *Burch*,

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will disconnect service immediately after the customer breaches the payment obligation. Memorandum of Law in Support of Appellant's Motion for Reconsideration at 9, United Cable Television of Baltimore L.P. v. Burch, 354 Md. 658, 732 A.2d 887 (1999) (No. 82). Once the cable company disconnects service, the customer will be required to pay a federally authorized reconnection charge of twenty to forty dollars. *See id.* at 9, 12.

140. *See Burch*, 354 Md. at 667, 732 A.2d at 892 (stating that United may not recover costs of collection as an element of damages under a contract for the payment of money).

141. Late paying customers are best able to avoid causing the seller to incur collection costs because they, not the seller, make the decision to pay or not to pay on time. *See* Maryland Chamber of Commerce's Memorandum of Law in Support of Reconsideration or Clarification of June 8, 1999 Opinion, *supra* note 134, at 3-4 (arguing that late fees serve the useful purpose of imposing the cost of late payments on those customers who pay late).

142. *See Burch*, 352 Md. at 682, 732 A.2d at 900 (acknowledging United's policy argument that the rule would "result in spreading the cost of the delinquencies in payment across all subscribers").

143. *See* Maryland Chamber of Commerce's Memorandum of Law in Support of Reconsideration or Clarification of June 8, 1999 Opinion, *supra* note 135, at 8 (asserting that "many thousands of Maryland contracts are vulnerable to attack" as a result of *Burch*).

144. *See Burch*, 354 Md. at 683, 732 A.2d at 900 (asserting that Maryland common law, in conjunction with Article III, § 49, of the Maryland Constitution, limits damages for breach of a contract to pay money to six percent interest on the sum owed, while failing to acknowledge Maryland's line of collection cost cases beginning with *Bowie* in 1888).

however, the law seemed clearly to permit collection cost provisions.[145] Any party who exercised their rights to recover collection costs under such a provision could arguably be forced to return all amounts in excess of the six percent measure of damages.[146] As Judge Chasanow argued in his dissent, this opinion could be a significant detriment to Maryland businesses by creating "vast new vistas" for class action lawyers to explore.[147]

The Maryland General Assembly responded quickly to the Court of Appeals's unsettling decision by enacting legislation that effectively overruled the *Burch* holding that late fees are limited to one half percent interest on the sum owed per month.[148] Section 14-1315 allows parties to a consumer contract to agree to a monthly late fee provision that is as high as five dollars or 10% of the sum owed, whichever is greater, or 1.5% on the sum owed.[149] Moreover, the legislature made clear in the enacting legislation that these limitations governing late fee provisions are applicable retroactively to November 5, 1995.[150] The effect of this retroactivity is to close the "vast new vistas" of class action litigation that the *Burch* court opened temporarily and that Judge Chasanow warned of in his dissent.[151]

5. Conclusion.—The *Burch* court establishes that absent statutory authority, contractual provisions assessing late fees are limited to the

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145. *See* Bowie v. Hall, 69 Md. 433, 16 A. 64 (1888); Gaither v. Tolson, 84 Md. 637, 36 A. 449 (1897); Noyes Air Conditioning Contractors v. Wilson Towers Ltd. Partnership, 122 Md. App. 283, 712 A.2d 126 (1998); *see also supra* notes 29-68 and accompanying text (discussing the expanded application of the collection cost rule to include payment obligations arising out of a variety of types of contracts).

146. United's subscribers expressly agreed to pay a late fee to compensate for collection costs. *See Burch*, 354 Md. at 664, 732 A.2d at 890. Nevertheless, the court stated that United should have been permitted to retain only a maximum of 0.5% interest on the sum owed. *See id.* at 685, 732 A.2d at 902.

147. *See id.* at 694, 732 A.2d at 906 (Chasanow, J., dissenting).

148. MD. CODE ANN., COM. LAW § 14-115(f) (2000) (establishing that in a consumer contract, monthly late fees are limited to either (1) five dollars or 10% of the sum owed, whichever is greater; or (2) 1.5% of the sum owed).

149. *Id.*

150. S.B. 145, 414th Sess. of the Gen. Assembly (Md. 2000) (stating that the Act shall "apply to all late fees provided for in contracts entered into, or in effect, on or after November 5, 1995").

151. *See Burch*, 354 Md. at 694, 732 A.2d at 906 (Chasanow, J., dissenting) (warning that the majority opinion created a legal uncertainty with respect to late fees that could potentially be exploited by class action lawyers).

In April 2000, Maryland courts docketed approximately seventeen class actions challenging the reasonableness of late fees. Bridget Gutierrez, *Late Fees Bill Passes G.A., Awaits Glendening's Signature*, THE DAILY RECORD, Apr. 5, 2000, at 3A. Section 14-1315(f) presumably eliminates all these late fee challenges by providing a statutory basis for late fee clauses retroactive to November 5, 1995.

six percent annual rate of legal interest as set forth in Section 57 of Article III of the Maryland Constitution.[152] The court's reasoning for the rule is flawed because it misinterprets the prejudgment interest rule as a cap on damages, whereas it was previously applied only as a gap-filler to provide a measure of damages where the parties had not done so themselves by express agreement. Furthermore, the court failed to apply the collection cost rule, which enforces agreements like the one between United and its customers which allocates collection costs to a breaching party. The *Burch* court established a rule that threatened to increase the frequency of breach because the law grants consumers the option of delaying payment indefinitely by limiting damages to a mere 0.5% per month. Under such a rule, as more and more consumers begin to realize that they have the option to delay payment indefinitely, the number of default accounts would increase. Nonbreaching customers would be harmed by this rule because businesses would respond to it by charging higher prices to all customers as a means of recovering collection costs. Finally, the rule threatened to expose businesses to unforeseen liability for charging late fees to customers under agreements that clearly seemed to be enforceable under Maryland law at the time the agreements were made. The Maryland legislature responded quickly and correctly to the *Burch* court's unsettling decision by statutorily overruling a precedent that would have been bad for Maryland businesses and consumers.

MICHAEL ROLF HILL

152. *Burch*, 354 Md. at 689, 732 A.2d at 904 (Chasanow, J., dissenting).

VI. CRIMINAL LAW

A. The Court of Appeals Properly Rules Carjacking a General Intent Crime

In *Harris v. State*,[1] the Court of Appeals considered whether carjacking[2] is a specific or general intent crime.[3] The court, in a 4-3 decision, concluded that it was not, reasoning that there was "nothing in the language of the statute, the legislative history, or the nature of the crime itself to suggest that the Legislature intended to make carjacking a specific intent crime."[4] A review of the statute's legislative history[5] and its plain language convinced the court that the General Assembly intended to create a new offense that did not require

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1. 353 Md. 596, 728 A.2d 180 (1999).

2. The offense of carjacking is defined in Section 348A of Article 27 of the Maryland Annotated Code. Article 27 provides, in pertinent part:

> (b) *Elements of the offense.*—(1) An individual commits the offense of carjacking when the individual obtains unauthorized possession or control of a motor vehicle from another individual in actual possession by force or violence, or by putting that individual in fear through intimidation or threat of force or violence.
>
> (2) An individual commits the offense of armed carjacking when the individual employs or displays a deadly or dangerous weapon during the commission of a carjacking.
>
> . . . .
>
> (e) *Defenses.*—It is not a defense to the offense of carjacking or armed carjacking that the defendant did not intend to permanently deprive the owner of the motor vehicle.

MD. ANN. CODE art. 27, § 348A (1993).

3. *Harris*, 353 Md. at 599, 728 A.2d at 181. Specific intent crimes are those which require "some specific mental element or intended purpose above and beyond the mental state required for the mere *actus reus* of the crime itself." Wieland v. State, 101 Md. App. 1, 39, 643 A.2d 446, 464-65 (1994). When the crime consists only of a general intent to do the immediate act and embraces no additional purpose or design to be accomplished beyond that immediate act, that crime is considered to be one of general intent. *See id.* at 40, 643 A.2d at 465. Maryland's view that voluntary intoxication may be a defense to specific intent crimes but not to general intent crimes "is also the approach taken in most other jurisdictions." *See* State v. Shell, 307 Md. 46, 63, 512 A.2d 358, 367 (1986) (discussing voluntary intoxication as a defense in other jurisdictions).

4. *Harris*, 353 Md. at 616, 728 A.2d at 190.

5. The General Assembly enacted Section 348A as emergency legislation on April 26, 1993, following the brutal carjacking murder of Dr. Pamela Basu in Howard County, Maryland. *See* Act of April 26, 1993, ch. 69, 1993 Md. Laws 1084; *see also* Mobley v. State, 111 Md. App. 446, 453, 681 A.2d 1186, 1189 (1996) (citations omitted).

In September 1992, Pamela Basu was taking her twenty-two month-old daughter to a nursery in a prosperous residential area in Howard County, Maryland. *See* F. Georgann Wing, *Putting the Brakes on Carjacking or Accelerating It? The Anti Car Theft Act of 1992*, 28 U. RICH. L. REV. 385, 390-91 (1994) (describing Basu's carjacking). At a road junction, two men pulled her out of her late-model BMW and drove away, with her arm still tangled in the seatbelt outside her car. *See id.* at 391. They dragged her almost two miles until she fell away from the car, sideswiping a fence at one point to try to dislodge her. *See id.* She subsequently died from massive internal injuries. *See id.*

"any additional deliberate or conscious purpose beyond that of obtaining unauthorized possession or control of a motor vehicle."[6] The court explained that the statute had a dual purpose: "to enhance the penalties applicable to individuals who use force or threat of force or intimidation to obtain possession or control of a motor vehicle and to make it easier for prosecutors to obtain convictions for carjacking."[7] Consistent with its past efforts to construe statutes so as to effectuate the legislature's broad goals,[8] the Court of Appeals was correct in ruling that carjacking is a general intent crime.

1. The Case.—On November 26, 1996, the appellant, Timothy Harris, and his friend, Jack Tipton, were at the home of a mutual friend playing cards and drinking alcohol.[9] Tipton offered to drive Harris home, but testified that Harris became angry when he refused to drive into the District of Columbia.[10] Harris then forcibly removed Tipton from the car and drove away.[11] Appellant was subsequently indicted by the Grand Jury for Prince George's County for carjacking, unlawful taking of a motor vehicle, and second degree assault.[12]

At trial, Harris attempted to assert the defense of voluntary intoxication.[13] He testified that he was drinking alcohol and smoking marijuana throughout the evening and could not remember the events that occurred after he left his friend's house.[14] Harris argued that he was too intoxicated to form a specific intent, and requested a jury instruction on voluntary intoxication.[15] The trial court instructed the jury that "when charged with an offense requiring specific intent, a defendant cannot be guilty if he was so intoxicated by drugs and/or alcohol that he was unable to form the necessary intent."[16] The court, however, declined to instruct the jury that carjacking required specific

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6. *Harris*, 353 Md. at 607, 728 A.2d at 185.

7. *Id.* at 608-09, 728 A.2d at 186 (footnotes omitted).

8. *See id.* at 606, 728 A.2d at 184 (reaffirming that "the cardinal rule in statutory construction is to effectuate the Legislature's broad goal or purpose" (citing Gagliano v. State, 334 Md. 428, 435, 639 A.2d 675, 678 (1994))); *see infra* notes 21-26 (discussing this concept).

9. *See Harris*, 353 Md. at 600, 728 A.2d at 181.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* Voluntary intoxication is recognized in Maryland as relevant to determine the existence of the *mens rea* for specific intent crimes, but not for general intent crimes. *See* Shell v. State, 307 Md. 46, 63, 68-70, 512 A.2d 358, 367, 369-70 (1986) (discussing Maryland's approach to voluntary intoxication).

14. *See Harris*, 353 Md. at 600, 728 A.2d at 181.

15. *See id.*

16. *Id.*, 728 A.2d at 181-82.

intent, instead instructing that of the three charges, only the unlawful taking of a motor vehicle required specific intent.[17]

The jury found Harris not guilty of the unauthorized taking of a motor vehicle, and guilty of carjacking and assault.[18] The trial judge imposed a sentence of imprisonment of thirty years, with all but eighteen years suspended for the carjacking, and a ten-year concurrent sentence for the assault.[19] Harris appealed to the Court of Special Appeals and the Court of Appeals granted certiorari on its "own motion to address the issue of whether specific intent is an element of the crime of carjacking."[20]

2. Legal Background.—

a. A Brief Survey of Maryland Judicial Statutory Interpretation.— The Court of Appeals has consistently stated that "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature."[21] Courts look first to the actual language of the statute,[22] because "[t]he primary source of legislative intent is, of course, the language of the statute itself."[23]

When statutory language is free from ambiguity, courts generally do not look beyond the words of the statute to determine legislative

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17. *See id.*, 728 A.2d at 182.

18. *See id.*

19. *See* Brief for Appellant at 2, Harris v. State, 353 Md. 596, 728 A.2d 180 (1999) (No. 81).

20. *Harris*, 353 Md. at 601, 728 A.2d at 182.

21. Giant Food, Inc. v. Department of Labor, Licensing & Regulation, 356 Md. 180, 188, 738 A.2d 856, 860 (1999) (alteration in original) (internal quotation marks omitted) (quoting Oaks v. Connors, 339 Md. 24, 35, 660 A.2d 423, 429 (1995)); *see also* Board of License Comm'rs, v. Toye, 354 Md. 116, 122, 729 A.2d 407, 410 (1999) (quoting same passage); Degren v. State, 352 Md. 400, 417, 722 A.2d 887, 895 (1999) (same); Coburn v. Coburn, 342 Md. 244, 256, 674 A.2d 951, 957 (1996) ("This Court has made it clear that the cardinal rule in construing any statute is to ascertain and effectuate the intent of the legislature" (citing *Oaks*, 339 Md. at 35, 600 A.2d at 429)).

22. *See Toye*, 354 Md. at 122, 729 A.2d at 410 ("Legislative intent first must be sought in the actual language of the statute."); Anne Arundel County v. City of Annapolis, 352 Md. 117, 123, 721 A.2d 217, 220 (1998) (noting that in determining legislative intent "[w]e start by examining the language of the statute"); Marriott Employees Fed. Credit Union v. Motor Vehicle Admin., 346 Md. 437, 444-45, 697 A.2d 455, 458 (1997) ("Our search for legislative intent begins, and usually ends, with the words of the statute at issue." (citing Shuman, Kane v. Aluisi, 341 Md. 115, 119, 688 A.2d 929, 931 (1995))); *Coburn*, 342 Md. at 256, 674 A.2d at 957 (stating that "[t]he primary source for determining legislative intent is the language of the statute itself"); Romm v. Flax, 340 Md. 690, 693, 668 A.2d 1, 2 (1995) (noting that in construing the meaning of a statute, "[w]e start by examining the language of the statute" (citing Tucker v. Firemen's Fund Ins. Co., 308 Md. 69, 517 A.2d 730 (1986))); *Oaks*, 339 Md. at 35, 660 A.2d at 429 (recognizing that "[t]he first step in determining legislative intent is to look at the statutory language" (citing Fish Market v. G.A.A., 337 Md. 1, 650 A.2d 705 (1994))).

23. *Tucker*, 308 Md. at 73, 517 A.2d at 731.

intent.[24] Maryland's highest court has also stated that in construing a statute, it "assume[s] that the words of the statute are intended to have their natural, ordinary and generally understood meaning in the absence of evidence to the contrary."[25] The court has further commented that "where statutory language is plain and free from ambiguity and expresses a definite and sensible meaning, courts are not at liberty to disregard the natural import of words with a view towards making the statute express an intention which is different from its plain meaning."[26]

However, "where a statute is plainly susceptible of more than one meaning and thus contains an ambiguity, courts consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment."[27] Additionally, where the legislature has chosen not to define a term used in a statute, the Court of Appeals has acknowledged that the term should "be given its ordinary and natural meaning 'without resorting to subtle or forced interpretations for the purpose of extending or limiting its operation.'"[28]

When dealing with a criminal statute that is ambiguous, the rule of lenity may apply, entitling the defendant to the benefit of the ambiguity.[29] As the Court of Appeals has explained, "[l]enity expressly prohibits a court from interpreting a criminal statute to increase the penalty it places on a 'defendant when such an interpretation can be based on no more than a guess as to what [the legislature] intended.'"[30] The rule of lenity therefore applies only when statutory

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24. *See, e.g., id.*, 517 A.2d at 732 ("Of course, where statutory provisions are clear or unambiguous, no construction or clarification is needed or permitted . . . .").

25. Brodsky v. Brodsky, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990) (citing Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 73, 517 A.2d 730, 731-32 (1986)).

26. Fikar v. Montgomery County, 333 Md. 430, 434-35, 635 A.2d 977, 979 (1994) (quoting Potter v. Bethesda Fire Dep't, 309 Md. 347, 353, 524 A.2d 61, 63-64 (1987)).

27. *Tucker*, 308 Md. at 75, 517 A.2d at 732 (citing State v. Fabritz, 276 Md. 416, 348 A.2d 275 (1975); Height v. State, 225 Md. 251, 170 A.2d 212 (1961)).

28. Brown v. State, 285 Md. 469, 474, 403 A.2d 788, 791 (1979) (quoting Schweitzer v. Brewer, 280 Md. 430, 438, 374 A.2d 347, 352 (1977)).

29. *See* Gardner v. State, 344 Md. 642, 651, 689 A.2d 610, 614 (1997) ("An ambiguous penal statute is subject to the 'rule of lenity' which requires that such statutes be strictly construed against the State and in favor of the defendant." (citing Harris v. State, 331 Md. 137, 145, 626 A.2d 946, 950 (1993); State v. Kennedy, 320 Md. 749, 754, 589 A.2d 193, 195 (1990); Wynn v. State, 313 Md. 533, 539-40, 546 A.2d 465, 468-69 (1988); N. SINGER, SUTHERLAND ON STATUTORY CONSTRUCTION § 59.03, at 102-03 (5th ed. 1993))).

30. *Gardner*, 344 Md. at 651, 689 A.2d at 614 (quoting Monoker v. State, 321 Md. 214, 222, 582 A.2d 525, 529 (1990)). The United States Supreme Court has stated that "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended." Holloway v. United States,

language is so vague and legislative history so obscure that courts can do little more than hazard a guess as to legislative intent.

Ultimately, whether language is ambiguous or not, courts aim for logical interpretations of statutes—interpretations that construe statutes "reasonably with reference to the purpose, aim, or policy of the enacting body."[31] Courts examine the larger framework within which a statute is written and continually strive to heed the overriding purpose and goal of the statute, because the search for legislative intent is most accurately characterized as "an effort to 'seek to discern some general purpose, aim, or policy reflected in the statute.'"[32]

b. Maryland's Approach to General and Specific Intent Crimes.— There are at least two components of every crime—"the *actus reus* or guilty act and the *mens rea* or guilty mind or mental state accompanying a forbidden act."[33] It is "an axiom of criminal jurisprudence" that the accused must have acted with a culpable mental state to be guilty of a crime.[34] With regard to the *mens rea* element of criminal offenses, Maryland is one of many states that has adopted the specific intent-general intent distinction.[35] For offenses where no showing of particular intent is required, the Court of Appeals has held that the general intent to do the criminal act must be established.[36]

Courts have developed the distinction between specific and general intent crimes in response to the problem of the intoxicated offender.[37] In this situation, the concern is how to reconcile two conflicting theories on the fairest method by which to deal with intoxicated offenders: "[o]n the one hand, the moral culpability of a

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526 U.S. 1, 12 n.14 (1999) (alteration in original) (internal quotation marks omitted) (quoting Muscarello v. United States, 524 U.S. 125, 138 (1998)).

31. Tracey v. Tracey, 328 Md. 380, 387, 614 A.2d 590, 594 (1992).

32. Kaczorowski v. Mayor and City Council, 309 Md. 505, 513, 525 A.2d 628, 632 (1987) (quoting Melvin J. Sykes, *A Modest Proposal for a Change in Maryland's Statutes Quo*, 43 MD. L. REV. 647, 653 (1984)).

33. Garnett v. State, 332 Md. 571, 578, 632 A.2d 797, 800 (1993).

34. *Id.*

35. *See* Wieland v. State, 101 Md. App. 1, 35, 643 A.2d 446, 462 (1994); *see supra* note 87 (listing states that currently observe the general/specific intent distinction to include California, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Rhode Island, South Dakota, West Virginia, and Wyoming (list not exhaustive)).

36. *See* Warfield v. State, 315 Md. 474, 496, 554 A.2d 1238, 1249 (1989) (clarifying that while the misdemeanor crime of breaking and entering required no proof of felonious intent, "[t]his is not to say, however, that a general intent is not necessary [and that] [m]ens rea to break and enter must be established").

37. *See* People v. Hood, 462 P.2d 370, 377 (Cal. 1969) (stating that the distinction "evolved as a judicial response to the problem of the intoxicated offender").

drunken criminal is frequently less than that of a sober person effecting a like injury[;] [o]n the other hand, it is commonly felt that a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences."[38]

The Court of Special Appeals, in *Wieland v. State*,[39] quoting the California Supreme Court, explained the distinction between general and specific intent:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.[40]

In *Wieland*, the court also established that determining whether a particular crime possesses a necessary specific intent requires an examination of "each crime on an *ad hoc* basis."[41] The appropriate inquiry, then, is whether, "in addition to the general intent to do the immediate act, [the crime] embraces some additional purpose or design to be accomplished beyond that immediate act."[42]

Almost a decade earlier, in *Shell v. State*,[43] the Court of Appeals explained the concept of a specific intent:

> "A specific intent is not simply the intent to do the immediate act but embraces the requirement that the mind be conscious of a more remote purpose or design which shall eventuate from the doing of the immediate act. Though assault implies only the general intent to strike the blow, assault with intent to murder, rob, rape or maim requires a fully formed and conscious purpose that those further consequences shall flow from the doing of the immediate act. To break and enter requires a mere general intent but to commit burglary requires the additional specific intent of committing a felony after the entry has been made. . . . This is

38. *Id.* (citation omitted).

39. 101 Md. App. 1, 643 A.2d 446 (1994).

40. *Id.* at 37, 643 A.2d at 464 (quoting *Hood*, 462 P.2d at 377); *see also supra* note 3 (discussing specific and general intent).

41. 101 Md. App. at 37, 643 A.2d at 464.

42. *Id.* at 37-38, 643 A.2d at 464.

43. 307 Md. 46, 512 A.2d 358 (1986).

why even voluntary intoxication may negate a specific intent though it will not negate a mere general intent."[44]

The Court of Appeals and the Court of Special Appeals continue to be painstaking in their efforts to clarify the difference between general and specific intent,[45] perhaps in part due to the skepticism with which the distinction is looked upon in academic circles.[46] The essential distinction is between the intent to commit an act (general intent) and the intent to produce a consequence (specific intent).[47] The Court of Special Appeals has observed that:

> [a]ccurately employed, the term "specific intent" designates some specific mental element or intended purpose above and beyond the mental state required for the mere *actus reus* of the crime itself. Were it not so, every intentional crime would be deemed a specific intent crime and there would no longer even be such a category as that of general intent crimes.[48]

c. Federal Courts' Treatment of the General/Specific Intent Distinction.—Many federal courts, including the Fourth Circuit, have concluded that "[i]n the absence of an explicit statement that a crime

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44. *Id.* at 62-63, 512 A.2d at 366 (quoting Smith v. State, 41 Md. App. 277, 305, 398 A.2d 426, 442 (1979)).

45. In cases such as *Smith v. State*, 41 Md. App. 277, 398 A.2d 426 (1979) and *Shell v. State*, 307 Md. 46, 512 A.2d 358 (1986), the courts have attempted to fine tune and further clarify Maryland's specific intent law. In *Shell*, Judge Eldridge "conducted a thorough review of both specific intent generally and of the significance of the specific intent-general intent distinction to the defense of voluntary intoxication." *Wieland*, 101 Md. App. at 35-36, 643 A.2d at 463.

46. *See Wieland*, 101 Md. App. at 35, 643 A.2d at 463 (noting the criticism of such a distinction in academia (citing JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 142 (2d ed. 1960))).

47. *See* People v. Hood, 462 P.2d 370, 379 (1969) (determining that it would be improper to allow evidence of intoxication to relieve a man of responsibility for the crime of assault with a deadly weapon).

In *Hood*, the Supreme Court of California, addressing voluntary intoxication, explained that

> a drunk man is capable of forming an intent to do something simple, such as strike another, unless he is so drunk that he has reached the stage of unconsciousness. What he is not as capable as a sober man of doing is exercising judgment about the social consequences of his acts or controlling his impulses toward antisocial acts. He is more likely to act rashly and impulsively and to be susceptible to passion and anger. It would therefore be anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with a deadly weapon or simple assault, which are so frequently committed in just such a manner.

Id.

48. *Wieland*, 101 Md. App. at 39, 643 A.2d at 464-65.

requires specific intent, . . . only general intent is needed."[49] For example, the Sixth Circuit's rule of construction is that if a criminal statute "does not specify a heightened mental element such as specific intent, general intent is *presumed* to be the required element."[50] Both the Fourth and Sixth Circuits define the distinction between specific and general intent crimes in terms of how the intent is proved: general intent is proved "by probing the defendant's subjective state of mind" whereas specific intent is proved "by objectively looking at the defendant's behavior in the totality of the circumstances."[51]

d. The Federal Carjacking Statute.—The federal carjacking statute, as it was originally formulated,[52] was consistently construed by courts as a general intent crime.[53] However, the statute was amended by Congress in 1994 to require specific intent.[54] This new specific intent requirement was first recognized by the Ninth Circuit in *United States v. Randolph*.[55] The *Randolph* court explained that "[i]n determining whether a crime is a general intent offense or a specific intent

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49. United States v. Lewis, 780 F.2d 1140, 1142-43 (4th Cir. 1986) (holding that federal crime of assault resulting in serious bodily injury requires only general intent (citing United States v. Johnston, 543 F.2d 55, 58 (8th Cir. 1976); United States v. Martin, 536 F.2d 535 (2d Cir. 1976) (per curiam); United States v. Meeker, 527 F.2d 12, 14 (9th Cir. 1975))); *see also* United States v. Martinez, 49 F.3d 1398, 1401 (9th Cir. 1995) (observing that "[w]hen a statute does not contain any reference to intent, general intent is ordinarily implied"); United States v. Brown, 915 F.2d 219, 225 (6th Cir. 1990) (presuming general intent when statute does not specify a specific intent).

50. United States v. DeAndino, 958 F.2d 146, 148 (6th Cir. 1992) (quoting *Brown*, 915 F.3d at 225 (internal quotation marks omitted)).

51. United States v. Darby, 37 F.3d 1059, 1065 (4th Cir. 1994) (concluding that transmitting a threatening communication in interstate commerce requires only a general intent to threaten) (quoting *DeAndino*, 958 F.2d 146, 149).

52. Before a 1994 amendment, the Anti Car Theft Act of 1992 provided criminal punishments for "[w]hoever, possessing a firearm . . . takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so." 18 U.S.C. § 2119 (1992).

53. *See* United States v. Payne, 83 F.3d 346, 347 (10th Cir. 1996) (concluding that the taking element of carjacking does not require an intent to permanently deprive a victim of a motor vehicle and, therefore, holding that carjacking is a general intent crime); United States v. Oliver, 60 F.3d 547, 551 (9th Cir. 1995) (concluding that carjacking is a general intent crime and that voluntary intoxication is not a defense to general intent crimes); United States v. Martinez, 49 F.3d 1398, 1401 (9th Cir. 1995) (ruling carjacking a general intent crime because the statute contains no reference to any intent, and thus eliminates the defense of diminished capacity which is only cognizable for specific intent crimes).

54. *See* Act of Sept. 13, 1994, Pub. L. No. 103-322, § 60003(a)(14), 108 Stat. 1968, 1970 (1994) (codified as amended at 18 U.S.C. § 2119 (1994)) (adding the requirement that the perpetrator act "with the intent to cause death or serious bodily harm").

55. 93 F.3d 656, 661 (9th Cir. 1996) (noting that "no federal court appears to have construed § 2119's new intent requirement").

offense, [we] look to such factors as 'the elements of the offense' and 'the words and the purpose of the statute.'"[56] The court also stated that "if Congress wished to establish a specific intent crime, it would [write] with the intent to [do a particular act.]"[57] Because Congress had used this exact intent language in its 1994 amendment, the *Randolph* court determined that it had intended to incorporate a specific intent element into the federal carjacking statute.[58] Additionally, the court examined the legislative history surrounding the 1994 amendment and concluded that it did not "contravene [this] conclusion."[59]

e. Other States' Interpretations of Carjacking Statutes Similar to Maryland's.—The District of Columbia Court of Appeals has interpreted the District's carjacking statute as a general intent offense.[60] That statute requires only that the taking of the vehicle be performed "recklessly."[61] The D.C. Court of Appeals interpreted the *mens rea* of recklessness as something less than specific intent when it stated, in *Pixley v. United States*,[62] that "[a]n utterly heedless (perhaps alcohol-induced) mistaken belief in ownership accompanying a forcible demand for possession would . . . satisfy the [carjacking] statute, though not [the robbery statute]."[63] Therefore, the *Pixley* court concluded that voluntary intoxication was not a defense to the crime of carjacking.[64]

California courts have recognized that whereas robbery involves an intent to "permanently deprive" a victim of property, carjacking is satisfied by an intent to permanently *or temporarily* deprive the victim

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56. *Id.* (second alteration in original) (quoting United States v. Jim, 865 F.2d 211, 213 (9th Cir. 1989)).

57. *Id.* (internal quotation marks omitted) (quoting *Jim*, 865 F.2d at 214).

58. *See id.*

59. *Id.* (relying on language from the House Conference Report on the Violent Crime Control and Law Enforcement Act of 1994, which "characterizes [the change in language] as the 'addition of an intent standard for carjacking'" (quoting H.R. CONF. REP. NO. 103-711 (1994))).

60. *See* Pixley v. United States, 692 A.2d 438, 440 (1997) (stating that, unlike robbery, carjacking does not require "proof of a specific intent to steal the property taken").

61. D.C. CODE ANN. § 22-2903(a)(1) (1981) states:

> A person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle.

62. 692 A.2d 438, 440 (D.C. 1997).

63. *Id.* at 440.

64. *See id.*

of the vehicle.[65] In *People v. Antoine*,[66] the California Court of Appeal for the Fourth District noted that the California legislature's primary purpose behind enacting a special carjacking statute with a penalty greater than that for second degree robbery was that "carjacking is a particularly serious crime that victimizes persons in vulnerable settings and, because of the nature of the taking, raises a serious potential for harm to the victim, the perpetrator and the public at large."[67] The court explained that "[w]hether a carjacker is seeking thrills, [i.e., intending a temporary deprivation] or 'wheels,' [i.e., intending a permanent deprivation], the danger to the victims and to society is equally great."[68]

Florida's carjacking statute also provides that a "taking" of the vehicle is sufficient, whether the offender intends the deprivation to be temporary or permanent.[69] Thus, there is no requirement to prove specific intent to permanently deprive to be convicted of carjacking in Florida.[70]

In contrast to the District of Columbia, California, and Florida, New York classifies carjacking as robbery in the second degree.[71] New

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65. *See, e.g.*, People v. Green, 58 Cal. Rptr. 2d 259, 263 (Ct. App. 1996). The text of the California carjacking statute states:

> (a) "Carjacking" is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.
>
> . . . .
>
> (c) This section shall not be construed to supersede or affect Section 211 [robbery statute]. A person may be charged with a violation of this section and Section 211. However, no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211.

CAL. PENAL CODE § 215 (West 1999).

66. 56 Cal. Rptr. 2d 530, 534 (Cal. Ct. App. 1996).

67. *Id.*

68. *Id.*

69. FLA. STAT. ANN. § 812.133 (West 1999). The relevant portion reads:

> (1) "Carjacking" means the taking of a motor vehicle which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the motor vehicle, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Id.

70. *See, e.g.*, James v. State, 745 So. 2d 1141, 1143 (Fla. Dist. Ct. App. 1999) (affirming the defendant's carjacking conviction on the ground that the defendant intended to, at the very least, temporarily deprive the owner of possession or custody of his vehicle).

71. N.Y. PENAL LAW § 160.10 (McKinney 1999). The relevant portion reads:

> A person is guilty of robbery in the second degree when he forcibly steals property and when:

York Penal Law defines robbery as a "forcible stealing";[72] therefore, proof of specific intent to exert permanent control over the property taken or to cause permanent loss to the owner is required.[73] The New York Court of Appeals stated in *People v. Jennings*[74] that the specific intent of larceny "is simply not satisfied by an intent temporarily to use property without the owner's permission, or even an intent to appropriate outright the benefits of the property's short-term use."[75] While the New York robbery statute does not contain a specific intent requirement, a robbery charge incorporates the specific intent requirement of the lesser included larceny offense.[76] Thus, larcenous intent (i.e., specific intent to permanently deprive) is an indispensable ingredient of the crime of robbery.

In New York, carjacking is the fourth aggravating factor for robbery in the second degree.[77] This fourth aggravating factor was added in 1995 in response to the carjacking phenomenon.[78] In approving the legislation, the Governor explained:

> Instances of drivers being shot, assaulted, threatened, physically dragged, or otherwise forced from their vehicles have become so common as to have given rise to the term

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1. He is aided by another person actually present; or
2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
   (a) Causes physical injury to any person who is not a participant in the crime; or
   (b) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or
3. The property consists of a *motor vehicle*, as defined in section one hundred twenty-five of the vehicle and traffic law (emphasis added).

72. N.Y. PENAL LAW § 160.00 (McKinney 1999). Having defined robbery as a "forcible stealing," the New York robbery statute differentiates robbery from theft by violent or threatening circumstances. *See* People v. Chessman, 429 N.Y.S.2d 224, 228 (App. Div. 1980) (declaring that force coupled with larceny equals robbery).

73. In New York, whether a robber commits first, second, or third degree robbery, the requisite intent which the prosecution must prove remains the same. *See* People v. Gage, 687 N.Y.S.2d 202 (App. Div. 1999).

74. 512 N.Y.S.2d 652 (1986).

75. *Id.* at 660.

76. People v. Chessman, 429 N.Y.S.2d 224, 228 (App. Div. 1980) (holding that although the robbery statute does not require specific intent per se, a prosecutor must meet the intent requirement associated with the lesser included crime of larceny).

77. There are three degrees of robbery. The basic offense, robbery in the third degree, occurs when a person forcibly steals property. The addition of any one of the aggravating factors elevates the crime to robbery in the second or first degree. For robbery in the second degree, the aggravating factors are: "aided by another actually present," "causes physical injury," "displays what appears to be a firearm," or robs a "motor vehicle." N.Y. PENAL LAW § 160.00 (1990) (Practice Commentary).

78. *Id.*

> 'carjacking' . . . Under current law, however, in some carjacking cases the most serious charge prosecutors can bring is third-degree robbery, a class D felony offense carrying a maximum sentence of just seven years . . . . Given the seriousness, increasing incidence and urgent need to deter carjacking, in carjacking cases, prosecutors should always be able to charge at least second-degree robbery.[79]

e. Voluntary Intoxication as a Defense to Specific Intent Crimes.— It has long been accepted in Maryland that while voluntary intoxication is a defense to a specific intent crime, it is not a defense to a general intent crime.[80] Because the law holds individuals responsible for their actions of criminal conduct, voluntary intoxication provides no defense for those accused of a general intent crime.[81] With regard to specific intent crimes, however, the question becomes one of degree: whether the accused was sufficiently intoxicated to negate the specific intent required.[82]

Under early English common law, there was no such defense as voluntary intoxication.[83] Anyone guilty of a crime, though voluntary, was punished as though sober when committing the crime.[84] In the United States, the departure "from the early English rule came after murder was divided into degrees, whereupon evidence of intoxication was admitted to negate premeditation and deliberation."[85] The exception allowing drunkenness to disprove the *mens rea* for first degree

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79. *Id.* (citing Governor's Approval Memorandum 27).

80. *See* Avey v. State, 249 Md. 385, 388, 240 A.2d 107, 108 (1968) (noting the majority rule that where intoxication exists to a degree that it deprives the accused of his capacity to form a specific intent, one cannot be convicted of a crime requiring that intent); *see also* Shell v. State, 307 Md. 46, 58-63, 512 A.2d 358, 364-66 (1986) (surveying Maryland cases which allowed the assertion of voluntary intoxication as a defense to specific intent crimes but not general intent crimes).

81. *See Shell*, 307 Md. at 62-63, 512 A.2d at 366 (explaining the more remote purpose or design marking specific intent as a reason why voluntary intoxication may negate a specific intent, but not a mere general intent).

82. *See id.* at 61, 512 A.2d at 366 (emphasizing that the degree of intoxication required to negate specific intent is substantial); *see also* State v. Gover, 267 Md. 602, 607-08, 298 A.2d 378, 381 (1973) ("Evidence of drunkenness which falls short of a proven incapacity in the accused to form the intent necessary to constitute the crime merely establishes that the mind was affected by drink so that he more readily gave way to some violent passion and does not rebut the presumption that a man intends the natural consequence of his act.").

83. *See Shell*, 307 Md. at 59 n.11, 512 A.2d at 364 n.11 (citing 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 1 § 6, at 2 (1716); 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § III, at 25-26 (1898)).

84. *See id.* (quoting HAWKINS, *supra* note 83, at 2).

85. *Id.*

murder was eventually adapted to other offenses requiring a particular *mens rea*.[86]

Maryland's view that voluntary intoxication can serve as a defense in specific intent, but not general intent crimes, is the approach taken in most other jurisdictions.[87] Only a select few jurisdictions allow vol-

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86. *See id.* (citing Pigman v. Ohio, 15 Ohio 555 (1846); Director of Pub. Prosecutions v. Beard, A.C. 479 (1920)).

87. *See id.* at 63, 512 A.2d at 367; *see also* LA. REV. STAT. ANN. § 14:15 (West 1997) (providing that the intoxicated condition of an offender during commission of a crime is immaterial except, *inter alia*, where circumstances indicate that the intoxication has precluded the offender's ability to form specific intent); People v. Hood, 462 P.2d 370, 377 (Cal. 1969) (in bank) (observing that the distinction between specific and general intent crimes evolved as a judicial response to the problem of the intoxicated offender, and recognizing that on occasion, the moral culpability of a drunken animal is less than that of a sober individual effecting a like injury); Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985) (noting that the Florida Supreme Court has long recognized voluntary intoxication as a defense to specific intent crimes); State v. Enno, 807 P.2d 610, 620 (Idaho 1991) (acknowledging that it is well established in Idaho that the degree to which intoxication affects intent is a question of fact to be determined by the jury); People v. Mocaby, 551 N.E.2d 673, 677 (Ill. App. Ct. 1990) (stating that in order to constitute a defense to a criminal charge, the intoxication must be so extreme as to render defendant wholly incapable of forming the requisite intent to commit the crime in question); State v. Caldwell, 385 N.W.2d 553, 557 (Iowa 1986) (noting that it has been the general rule in Iowa that, although voluntary intoxication cannot constitute a defense to a crime, it may negate criminal intent if such intent is an element of the crime charged); State v. McDaniel, 612 P.2d 1231, 1237 (Kan. 1980) (stating that voluntary intoxication is not a defense to a general intent crime, although it may be used to demonstrate an inability to form a particular state of mind necessary for a specific intent crime); Commonwealth v. Troy, 540 N.E.2d 162, 166 (Mass. 1989) (commenting that voluntary intoxication has no mitigating effect for a general intent crime, in this case, rape); People v. Langworthy, 331 N.W.2d 171, 180 (Mich. 1982) (holding that the offenses of first-degree criminal sexual conduct and second-degree murder are general intent, not specific intent crimes, thus voluntary intoxication is not a defense); State v. Kjeldahl, 278 N.W.2d 58, 61 (Minn. 1979) (citations omitted) (acknowledging that voluntary intoxication is a valid defense only if specific intent is an essential element of the crime in question); State v. Lesiak, 449 N.W.2d 550, 552 (Neb. 1989) (holding that the offense of procuring liquor for a minor does not involve a specific criminal intent, and thus, voluntary intoxication is not a defense); Nevius v. State, 699 P.2d 1053, 1060 (Nev. 1985) (holding that for a defendant to obtain a jury instruction on voluntary intoxication as negating specific intent, evidence must show the defendant's consumption of intoxicants, the intoxicating effect of said intoxicants, and the resulting effect on the defendant's mental state); State v. Tapia, 466 P.2d 551, 553 (N.M. 1970) (stating that specific intent is not required for a second-degree murder conviction, thus voluntary intoxication is no defense); State v. White, 229 S.E.2d 152, 157 (N.C. 1976) (noting that since specific intent is not an essential element of the crime of common-law arson, voluntary intoxication is not a defense); Boyd v. State, 572 P.2d 276, 278-79 (Okla. Crim. App. 1977) (finding only a general criminal intent requirement for rape, such that voluntary intoxication is not available as a defense); State v. Sanden, 626 A.2d 194, 199 (R.I. 1993) (commenting that it is well settled law in Rhode Island that if specific intent is an essential element of a crime, then defendant's intoxication may be offered to negate specific intent if the intoxication is of such a degree as to completely overpower the defendant's will and render his mind incapable of reasoned thought); State v. Primeaux, 328 N.W.2d 256, 259 (S.D. 1982) (deciding that the 'depraved mind' requirement of South Dakota's second-

untary intoxication to negate any mental state.[88] Likewise, only a few states absolutely preclude voluntary intoxication evidence in all cases.[89] Most jurisdictions, like Maryland, fall somewhere in the spectrum between the two extremes.[90] While the distinction between specific and general intent crimes has drawn criticism from both courts and scholars,[91] the Court of Appeals of Maryland maintains that "it

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degree murder statute requires only general intent to do the acts which caused the harm and thus, agreeing with lower court's determination that a voluntary intoxication diminished capacity instruction was improper); State v. Keeton, 272 S.E.2d 817, 820 (W. Va. 1980) (acknowledging that while voluntary drunkenness does not ordinarily excuse a crime, it may reduce the degree of a crime or negate a specific intent); Crozier v. State, 723 P.2d 42, 51 (Wyo. 1986) (stating that in Wyoming, intoxication may negate the existence of a specific-intent element of a specific-intent crime, but it is not a factor affecting a general-intent crime).

88. *See Shell*, 307 Md. at 63 n.13, 512 A.2d at 367 n.13 (noting that Hawaii and Iowa, by statute, admit evidence of voluntary intoxication whenever it is relevant to any element of an offense) (citing Hawaii Rev. Stat. § 702-230 (1976); Iowa Code Ann. § 701.5 (West 1979)).

89. *See Shell*, 307 Md. at 64 n.14, 512 A.2d at 367 n.14 (identifying Missouri and Texas as states which, by statute, preclude admission of voluntary intoxication evidence in all cases); *see also* DEL. CODE ANN. tit. 11, § 421 (1995) (stating that intoxication is no defense to any criminal charge if the intoxication was voluntary); GA. CODE ANN. § 26-704(c) (1988) (stating that voluntary intoxication shall not be an excuse for any criminal act or omission); MO. REV. STAT. § 562.076.1 (West 1979 & Supp. 1996) (noting that evidence that an individual was voluntarily intoxicated shall never be admissible for the purpose of negating a mental state which is an element of the offense); MONT. CODE ANN. § 45-2-203 (1995) (providing that an intoxicated individual is criminally responsible for his conduct and a voluntarily intoxicated condition is not a defense to any offense, nor may it be considered when determining the existence of a mental state which is an element of the offense); White v. State, 717 S.W.2d 784, 787-88 (Ark. 1986) (declaring that voluntary intoxication is not a defense in criminal prosecutions); McDaniel v. State, 356 So. 2d 1151, 1160-61 (Miss. 1978) (Sugg, J., specially concurring) (holding firm to the common law rule that there is no injustice in holding a person responsible for crimes committed in a state of voluntary intoxication, on the basis that, if one casts off the restraints of reason by a voluntary act, no wrong is done to him if he is held accountable for any crime he may commit in that condition); State v. Erwin, 848 S.W.2d 476, 482 (Mo. 1993) (en banc) (stating that a jury may not consider intoxication on the issue of a defendant's mental state); State v. Vaughn, 232 S.E.2d 328, 330 (S.C. 1977) (adopting the rule that voluntary intoxication, where it has not produced permanent insanity, is never an excuse for or a defense to crime, regardless of whether the intent involved be general or specific).

90. *See Shell*, 307 Md. at 64, 512 A.2d at 367 (noting that most other jurisdictions distinguish between specific intent and general intent).

91. The general intent/specific intent distinction is far from perfect. Courts have continually recognized the limitations and difficulties in applying the distinction, most notably that an actor who is so intoxicated that he is unable to intend a proscribed consequence is likely to be similarly unable to intend a forbidden act. *See Hood*, 462 P.2d at 378 (stating that there is only a linguistic difference between an intent to do an act already performed and an intent to do that same act in the future); People v. Kelley, 176 N.W.2d 435, 443 (Mich. Ct. App. 1970) (recognizing the argument that there is no intrinsic meaning to the terms "specific intent" and "general intent").

Due to the technical difficulties involved in applying the specific intent doctrine, the Model Penal Code developed a new method for achieving partial responsibility for intoxi-

does serve to reconcile fairness to the accused with the need to protect the public from intoxicated offenders and to deter such persons."[92]

3. The Court's Reasoning.—In *Harris v. State*, the Court of Appeals held carjacking to be a general intent crime.[93] Writing for the majority, Judge Raker[94] concluded that there is nothing in the language of the carjacking statute, the legislative history of the statute, or the nature of the crime itself to suggest that the Legislature's intent was to make carjacking a specific intent crime.[95] Because the court ruled that carjacking was not a specific intent crime, it followed that voluntary intoxication could not be raised as a defense.[96]

After setting forth the text of the carjacking statute,[97] and explaining the difference between a specific and a general intent crime,[98] the court turned to the question of the carjacking statute's requisite intent. The court began by stating that, "[v]iewing the statute as a whole, the language of the carjacking statute does not evidence an intent on the part of the General Assembly to create a specific intent crime."[99] The court explained that where the statute in question contains no "reference to intent, general intent is ordinarily implied."[100] Because "[t]he General Assembly has created specific intent crimes, using explicit language to indicate the required specific intent" the court reasoned that "when the legislature desires to create a specific intent crime, it knows how to do so."[101]

The court next looked to the "plain language of the statute."[102] The court recognized, first, that "the Legislature clearly and unequivocally provided that any sentence imposed for carjacking may be separate from and consecutive to a sentence for any other offense arising from the conduct underlying the offenses of carjacking or armed

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cated offenders. MODEL PENAL CODE § 2.08(1) (1962) (Explanatory Note). The Model Penal Code allows intoxication evidence to be admitted in prosecutions for crimes requiring purpose or knowledge, but not in those requiring only recklessness or negligence. *Id.*

92. *Shell*, 307 Md. at 65, 512 A.2d at 367.

93. *Harris*, 353 Md. at 599, 728 A.2d at 181.

94. Judge Raker's majority opinion was joined by Judges Rodowsky, Wilner, and Cathell. *See id.*

95. *Id.* at 616, 728 A.2d at 190.

96. *Id.*

97. *See id.* at 601-02, 728 A.2d at 182.

98. *See id.* at 603-05, 728 A.2d at 182-84.

99. *Id.* at 606, 728 A.2d at 184.

100. *Id.*, 728 A.2d at 184-85 (quoting United States v. Martinez, 49 F.2d 1398, 1401 (9th Cir. 1995)).

101. *Id.* at 606 n.3, 728 A.2d at 185 n.3 (citing MD. ANN. CODE art. 27, § 29(a) (1996)).

102. *Id.* at 606, 728 A.2d at 184.

carjacking."[103] Second, the court noted that by explicitly stating in the carjacking statute that a lack of intent to permanently deprive the owner of the vehicle was not a defense, the General Assembly had focused on the issue of specific intent, but chose not to include a different intent requirement.[104] Because the General Assembly did not include a different specific intent, the court reasoned, the statute required only the intent to do the proscribed act.[105]

The court turned next to the legislative history of the carjacking statute.[106] It determined that the General Assembly had two primary goals in enacting the statute: first, to enhance the penalties applicable to individuals who carjack,[107] and second, to enable prosecutors to obtain carjacking convictions more easily.[108] In light of these goals, the court concluded that the General Assembly "did not intend to require a specific intent to achieve some additional consequence beyond the immediate act of taking the vehicle."[109]

Finally, the court considered the nature of the crime of carjacking itself.[110] It noted that a temporary deprivation of the vehicle was "substantially certain to result, regardless of the desire of the actor," from the commission of the act itself, and that the General Assembly provided no indication that the mind of the perpetrator needed to contemplate a "more remote purpose of design which shall eventuate from the doing of the immediate act."[111] Therefore, the court concluded that the legislature's "clear intent" was to make carjacking a general intent crime.[112]

The court then considered the treatment of carjacking statutes in other states and in the federal system.[113] It noted that several other states had determined that carjacking is a general intent crime.[114] The majority also observed that under the federal statute, prior to the 1994 amendment, carjacking was consistently construed as a general

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103. *Id.* at 607, 728 A.2d at 185.
104. *See id.*
105. *See id.*
106. *See id.*
107. *See id.* at 608-09, 728 A.2d at 186 (footnote omitted).
108. *Id.* at 609, 728 A.2d at 186 (footnote omitted).
109. *Id.* at 610, 728 A.2d at 186.
110. *Id.*
111. *Id.* (internal quotation marks omitted).
112. *See id.*
113. *See id.* at 611, 728 A.2d at 187.
114. *See id.* at 611-12, 728 A.2d at 187 (naming Michigan and the District of Columbia as two locales which hold carjacking to require only a general intent); *see also supra* notes 61-79 and accompanying text (discussing approaches taken by several other states and the District of Columbia).

intent crime.[115] Only in 1994, when the statute was amended to require that the taking be with the "intent to cause death or serious bodily harm," was the statute interpreted to require a specific intent.[116]

In a dissenting opinion, Chief Judge Bell[117] took issue with the majority's characterization of carjacking as a general intent crime.[118] Chief Judge Bell argued that negating the intent to permanently deprive as a defense did not equate to eliminating altogether the requirement to prove specific intent to *temporarily* deprive the owner of the vehicle.[119] He further urged that the General Assembly, in specifying the specific intent which is not a defense, was "inferentially recogniz[ing] that another, lesser specific intent may be a defense."[120] The dissent submitted that to interpret the statute as not requiring any intent to deprive would render the word "permanently" superfluous, contrary to the rules of statutory construction.[121] The dissent further advocated for the application of the rule of lenity,[122] arguing that the statute was, "at best ambiguous," and where a criminal statute is ambiguous, the conflict should be resolved in the defendant's favor.[123]

The dissent also analogized carjacking to robbery, a common law offense in Maryland which requires proof of a specific intent to permanently deprive an individual of his property.[124] The dissent relied on the Ninth Circuit's decision in *United States v. Martinez*,[125] in which that court stated that the federal robbery and carjacking statutes were identical with respect to intent, thereby concluding that since robbery, under federal law, is a general intent offense, carjacking should

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115. *See Harris*, 353 Md. at 612, 728 A.2d at 187-88; *see also supra* note 53 (discussing federal courts' interpretation of the federal carjacking statute).

116. *Id.* at 613, 728 A.2d at 188 (citing United States v. Randolph, 93 F.2d 656, 661 (9th Cir. 1996)). The majority also rejected Harris's argument that "carjacking is little more than aggravated robbery without the need to prove specific intent to permanently deprive." *Id.* at 614, 728 A.2d at 188. The court reasoned that because the element of each crime was different, each could be committed without committing the other. *See id.*

117. The dissent was joined by Judges Eldridge and Chasanow. *See id.* at 617, 728 A.2d at 190 (Bell, C.J., dissenting).

118. *See id.*

119. *See id.* at 621, 728 A.2d at 192.

120. *Id.*

121. *Id.* ("It is well settled that 'absent a clear intent to the contrary, a statute is to be read so that no work . . . is rendered surplusage, superfluous, meaningless, or nugatory.'" (quoting Montgomery County v. Buckman, 333 Md. 516, 636 A.2d 448 (1994))).

122. *See supra* notes 29-30 and accompanying text (discussing the rule of lenity).

123. *Id.* at 621, 728 A.2d at 192.

124. *See id.* at 623, 728 A.2d at 193.

125. 49 F.3d 1398, 1401 (9th Cir. 1995).

be as well.[126] Under this rationale, the dissent argued that "since robbery under Maryland law is a specific intent offense and the carjacking statute negates only the intent permanently to deprive, carjacking requires proof of specific intent as well."[127]

Chief Judge Bell also found it illogical and fundamentally unfair that felony theft, robbery, and armed robbery are all specific intent crimes with punishments of up to fifteen years, and twenty years of imprisonment, respectively, yet carjacking is a general intent crime and thus, easier to prove, but with the much harsher punishment of up to thirty years' imprisonment.[128] The dissent concluded that this result was unreasonable, and that the majority should have rejected its interpretation in favor of one that would yield a more reasonable result.[129]

4. Analysis.—In ruling carjacking a general intent crime, the Court of Appeals of Maryland correctly interpreted the statute in a manner that effectuated the General Assembly's broad goals and was consistent with the nature of carjacking, while maintaining uniformity with other states' rulings on similar statutes.

a. The Harris *Court Correctly Interpreted the Carjacking Statute as not Requiring Specific Intent.*—The main point of contention between the majority and dissenting opinions in *Harris* was the language of subsection 348A(e) of the carjacking statute: "It is not a defense to the offense of carjacking or armed carjacking that the defendant did not intend to permanently deprive the owner of the motor vehicle."[130] The majority viewed the elimination of specific intent to permanently deprive as clear evidence that the General Assembly did not intend to make carjacking a specific intent crime.[131] The court properly reasoned that this language demonstrated the General Assembly's apparent intent that one could commit the offense by committing the act, without the need for any "additional deliberate and conscious purpose or design [toward] accomplishing a very specific and more remote result."[132]

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126. *See Harris*, 353 Md. at 623, 728 A.2d at 193 (Bell, C.J., dissenting) (citing *Martinez*, 49 F.3d at 1401).

127. *Id.*

128. *See id.* at 627, 728 A.2d at 194-95.

129. *See id.*

130. MD. ANN. CODE art. 27, § 348A(e) (1996 & Supp. 1997) (discussing the distinction between specific intent and general intent).

131. *See Harris*, 353 Md. at 607, 728 A.2d at 185.

132. Shell v. State, 307 Md. 46, 63, 512 A.2d 358, 366 (1986) (quoting Smith v. State, 41 Md. App. 277, 305, 398 A.2d 426, 442 (1979)).

Like the New York statute which classifies carjacking as robbery in the second degree and thus requires that specific intent to permanently deprive be proven,[133] the Maryland General Assembly could have included specific intent had it desired. It could have inserted express words of intent, but elected not to. This is relevant because, as the *Harris* majority noted, the legislature has drafted numerous specific intent statutes using express intent language.[134] The absence of words of intent in the carjacking statute speaks of general intent with almost as much force as actual words could. Consistent with the presumption employed by a number of courts that absence of an explicit requirement of specific intent equated to a requirement of only general intent,[135] the Court of Appeals of Maryland correctly held that the carjacking statute requires only general intent.

The conclusion that the legislature deliberately omitted specific intent language from the statute is also supported by the purpose of the General Assembly in enacting the carjacking statute and the legislative history of the statute. The statute was enacted in the 1993 Session of the General Assembly in response to an alarming escalation in vehicle hijacking in 1992 and, in particular, the violent carjacking murder of Dr. Pamela Basu in Howard County, Maryland.[136] While the separate acts constituting a carjacking fell within chargeable offenses, the legislature felt that "the existing penalties [were] wholly inadequate for the gravity of the offense."[137]

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133. *See supra* note 71 and accompanying text (setting forth the text of the New York carjacking statute).

134. *See Harris*, 353 Md. at 606 n.3, 728 A.2d at 180 n.3 (listing burglary in the first, second, and third degrees as specific intent crimes which the General Assembly created using explicit language to indicate specific intent).

135. *See supra* note 49 and accompanying text (citing cases that have adopted this presumption).

136. *See* Price v. State, 111 Md. App. 487, 494-95, 681 A.2d 1206, 1209 (1996) (recognizing that the enactment of the Maryland carjacking statute was motivated by "'the alarming escalation of armed hijacking of vehicles,' and specifically . . . [by] the case of Pamela Basu" (quoting Brief of Appellant, Price v. State, 111 Md. App. 487, 681 A.2d 1206 (1996) (No. 2033))); *see also Harris*, 353 Md. at 608, 728 A.2d at 185 (noting that the carjacking bills were introduced as emergency legislation in response to the Pamela Basu carjacking). In 1992, there were 445 carjacking incidents, in which twelve people were either killed or seriously injured, and thirty-nine which involved major injury. *See Price*, 111 Md. App. at 495, 681 A.2d at 1209.

137. *See Harris*, 353 Md. at 608, 728 A.2d at 185-86 (quoting testimony of Steven B. Larsen of the Governor's Legislative Office before the Senate Judicial Proceeding Committee on Senate Bill 339); *see also Price*, 111 Md. App. at 497, 681 A.2d at 1211 (stating that "the intent of the legislature [in enacting the carjacking statute] was to proscribe actions which *although already crimes*, i.e., robbery, were deemed to be of such an aggravated nature as to require specific legislation and punishment") (emphasis added).

Carjacking under the Maryland statute is essentially robbery of a motor vehicle without the added requirement of proving an offender's specific intent to permanently deprive the owner of his property.[138] Since the purpose of the enactment was to provide harsher penalties than those available prior to the enactment of the statute,[139] and to send a message to carjackers that penalties would be severe, reading anything but a general intent requirement into the statute would only serve to frustrate legislative intent.[140] Also, requiring prosecutors to prove that a defendant had a specific intent would make it more difficult to obtain convictions for carjacking, contrary to the intent of the legislature.[141]

b. The Harris *Court Correctly Determined that Carjacking is, by its Nature, a General Intent Crime.*—The appropriateness of the *Harris* decision under the general/specific intent doctrine is confirmed by its consistency with decisions from other states interpreting similar carjacking statutes.

Although Maryland's carjacking statute contains even less statutory language on intent than the carjacking statutes of the District of Columbia, California, and Florida, courts in those states have also interpreted their respective statutes as requiring only general intent.[142] Both California and Florida punish offenders that act with "the intent to either permanently or temporarily deprive."[143] This is consistent with the concept of general intent, because it is inherent in the nature of the crime of carjacking that obtaining unauthorized possession or control from another will necessarily include temporary deprivation

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138. *See id.*

139. *See Harris*, 353 Md. at 608, 728 A.2d at 186 (quoting Steven B. Larsen of the Governor's Legislative Office before the Senate Judicial Proceeding Committee on Senate Bill 339).

140. *See id.* at 608-09, 728 A.2d at 186 (noting that one of the goals of the carjacking statute was "to enhance the penalties applicable to individuals who use force or threat of force or intimidation to obtain possession or control of a motor vehicle").

141. *See id.* ("It is clear that the broad aim of the [carjacking] statute was to . . . make it easier for prosecutors to obtain convictions for carjacking."); *see also* People v. Antoine, 56 Cal. Rptr. 2d 530, 534 (Cal. Ct. App. 1996) (noting that the California legislature was motivated to make carjacking a crime "because of its growing frequency among thrill seekers and because of the difficulty in convicting such individuals of traditional robbery").

142. *See supra* notes 61-76 and accompanying text (citing and interpreting the D.C., California, and Florida carjacking statutes as requiring only general intent).

143. *See* CAL. PENAL CODE § 215 (West 1999) (requiring that a carjacking perpetrator act "with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession"); FLA. STAT. ANN. § 812.133 (West 1999) (defining carjacking as "the taking of a motor vehicle . . . with intent to either permanently or temporarily deprive the person or the owner of the motor vehicle").

from the other person.[144] Thus, temporary deprivation is intrinsic to the commission of the crime and is indicative of some intended purpose above and beyond the mental state required for the mere *actus reus* of the crime itself.[145]

Also, as the California Court of Appeal recognized in *People v. Antoine*, whether a carjacker's intent is momentary thrill or permanent deprivation of property from the rightful owner, the danger to the victims is equally great.[146] Intent, beyond a general intent to commit the act, would be difficult to determine, as it would involve delving into the mind of the criminal. Furthermore, intent beyond what intent plainly existed for the actus rea of the crime, is inconsequential to the Maryland carjacking statute—much in the same way that breaking and entering may result from a well-planned scheme or merely the rash, impetuous conduct of a defendant, carjacking may also result from either of the two scenarios.

c. Federal Courts' Interpretation of the Federal Carjacking Statute Supports the Majority's Ruling.—Consistent with federal courts which have interpreted the absence of explicit words of intent in the originally enacted federal carjacking statute as signifying only general intent,[147] the Court of Appeals similarly and correctly construed section 348A as a general intent crime.[148] The Court was understandably hesitant to read in a requirement that the General Assembly did not see fit to include. Moreover, accepted rules of statutory construction in the state of Maryland forbid courts from "disregard[ing] the natural import of words with a view towards making the statute express an intention which is different from its plain meaning."[149]

d. The Dissent's Argument for Specific Intent is Supported by Neither Statutory Construction Nor Prior Case Law.—The dissent's argument for reading specific intent into the Maryland carjacking statute is not supported by either a common sense approach to statutory construction or prior case law. First, although the dissent argues that the rule of lenity is applicable,[150] the rule of lenity is inappropriate in a

144. *Harris*, 353 Md. at 610, 728 A.2d at 186.

145. *See supra* notes 43-47 and accompanying text (discussing definitions of specific intent and contrasting it with general intent).

146. 56 Cal. Rptr. 2d 530, 534 (Cal. Ct. App. 1996).

147. *See supra* notes 49-51 and accompanying text (detailing federal courts' interpretation of statutes with no explicit intent language).

148. *Harris*, 353 Md. at 611-12, 728 A.2d at 187.

149. Potter v. Bethesda Fire Dep't, 309 Md. 347, 353, 524 A.2d 61, 63-64 (1987).

150. *See Harris*, 353 Md. at 621-22, 708 A.2d at 192 (Bell, C.J., dissenting).

case, such as this, where legislative intent may be discerned.[151] The rule of lenity must be used only in cases of ambiguity, and not applied simply as a means to promote leniency in criminal punishment.[152] In the present case, there is information from which to ascertain the Legislature's purpose in creating the carjacking statute, including the plain language of the statute and the legislative history surrounding its enactment.[153] Both the language and the history provide insight to the General Assembly's purpose in creating section 348A.[154] With this information, there is no need to guess the legislative intent in creating the statute, thereby eliminating the need to apply the rule of lenity. Therefore, applying the rule would only serve to defeat the General Assembly's goal to send a message to offenders that carjacking is a crime which would be punished harshly.[155]

The dissent also argues that the use of the word "permanently" in subsection (e) of the statute only negates a specific intent to permanently deprive, so that the legislature may have intended "that another, lesser specific intent may be a defense."[156] However, this argument is flawed for several reasons. First, it ignores the well-accepted principle that when a statute does not mention intent, general intent is assumed to apply.[157] Also, if some assumption must be made, it is more reasonable to assume that if the legislature wished to include some specific intent requirement, it would have written it into the statute.[158] By explicitly excluding the need to show an intent to *permanently* deprive, the legislature quite possibly might have intended to require only an intent to *temporarily* deprive, which, as demon-

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151. *See supra* note 30 and accompanying text (quoting the Supreme Court as holding that "[t]he rule of lenity applies only if, after seizing everything from which aid may be derived, . . . [courts] can make no more than a guess as to what Congress intended." (internal quotation marks omitted)).

152. *See generally* Dillsworth v. State, 308 Md. 354, 365, 519 A.2d 1269, 1274 (1987) ("*Lenity . . . serves only as an aid for resolving an ambiguity; it is not to be used to beget one.*" (quoting Albernaz v. United States, 450 U.S. 333, 342 (1981))).

153. *See Harris*, 353 Md. at 607-10, 728 A.2d at 185-87 (analyzing the plain language of § 348A and the legislative history, both of which serve to illuminate the reader as to the legislature's purpose in creating the statute).

154. *Id.*

155. *Id.* at 608-10.

156. *See id.* at 621, 708 A.2d at 192 (Bell, C.J., concurring).

157. *See supra* notes 24-26 and accompanying text (illustrating the principle that when statutory language is plain and free from ambiguity and expresses a definite meaning, courts are not free to attempt to make the statute express an intention which is different from its plain meaning).

158. *See Harris*, 353 Md. at 606 n.3, 728 A.2d at 185 n.3 (noting the General Assembly's past use of explicit specific intent language as an indication that when it desires to create a specific intent crime, it knows to include explicit language).

strated earlier, is inherent in the general intent requirement of carjacking.[159]

The dissent's next argument for reading specific intent into the carjacking statute stems from an analogy to robbery, a common law offense in Maryland requiring specific intent to permanently deprive.[160] This argument is unpersuasive because it does not propound any new reason to accept the claim that the carjacking statute negates only the permanent intent to deprive, and not the need for a specific intent reading altogether. Also, it ignores the majority's point that "[t]he elements of carjacking differ from the elements of robbery and each offense can be committed without committing the other offense."[161]

The dissent's final criticism of the majority's decision is the inverse relationship that will not exist between the general intent crime of carjacking and the severity of the punishment. The dissenters found it illogical that the legislature could have intended that the specific intent crimes of theft, robbery, and armed robbery would have lesser punishments than the general intent crime of carjacking, which is easier to prove in court.[162] The severity of a crime and its corresponding punishment, however, are not necessarily a function of whether it requires specific or general intent. Indeed, there are many crimes requiring only general intent (i.e., depraved heart murder, felony murder) that have far greater penalties attached than many specific-intent crimes such as robbery and burglary.[163] Also, the legislative history of the Maryland carjacking statute demonstrates that the legislature was most concerned with the particularly violent and frightening nature of carjacking rather than the deprivation of the motor vehicle.[164] Therefore, it is appropriate that the penalties for

159. *Id.* at 607, 728 A.2d at 185.

160. *See id.* at 623, 728 A.2d at 192 ("[S]ince robbery under Maryland law is a specific intent offense and the carjacking statute negates only the intent to permanently deprive, carjacking requires proof of specific intent as well.").

161. *Id.* at 614, 728 A.2d at 188 ("An essential element of carjacking, unlike robbery, is the taking of a specific type of property, i.e., a motor vehicle. Unlike robbery, the carjacking statute requires no movement or asportation, only unauthorized possession or control.").

162. *Id.* at 626, 728 A.2d at 195.

163. Both depraved heart murder (falling under MD. ANN. CODE art. 27, § 411 (1957)) and felony-murder (MD. ANN. CODE art. 27, § 410 (1957)) carry penalties of 30 years and life, respectively.

164. *See Harris*, 353 Md. at 608, 728 A.2d at 185 (recognizing that the intent of the Maryland legislature in enacting the carjacking statute was to reach activity, although already criminal, that was of such an aggravated nature as to require specific punishment); Price v. State, 111 Md. App. 487, 495, 681 A.2d 1206, 1209 (1996) (noting commentary in favor of the carjacking bill that emphasized "the terror of the victim" in carjacking scena-

carjacking, even without a specific intent requirement, be greater than those for robbery and theft.

5. Conclusion.—In keeping with the cardinal rule in statutory construction of reading the statute to effectuate the legislature's broad aim, the General Assembly did not intend for carjacking to be a specific intent crime. The absence of intent language, the General Assembly's explicit provision that "any sentence imposed for carjacking may be separate from and consecutive to a sentence for any other offense arising from the conduct underlying the offense of carjacking,"[165] and the elimination of the specific intent to permanently deprive as a defense all point toward the legislative intent to make carjacking a general intent crime. When further analyzed within the rubric of the statute's dual purpose—to enhance the penalties applicable to individuals who use force or threat of force to obtain control or possession of a vehicle and to make it easier for prosecutors to obtain convictions[166]—the legislative intent is relatively clear. The most effective way to implement these goals is through the prosecution of carjacking as a general intent crime. The majority made a practical appeal to common sense with its reading of the plain language of the carjacking statute. In concluding that carjacking is a general intent crime, the Court of Appeals reached the proper result and appropriately refused to engage in a far-reaching statutory interpretation that would have only served to interfere with the legislature's fundamental goals.

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rios); *see also* People v. Antoine, 56 Cal. Rptr. 2d 530, 534 (1996) (explaining that the California legislature created the crime of carjacking because "[i]t is a very serious crime that victimizes persons in vulnerable settings and, because of the nature of the taking, raises a serious potential for harm to the victim").

165. *Harris*, 353 Md. at 607, 728 A.2d at 185 (citing MD. ANN. CODE art. 27, § 348A(d) (1997 Supp.)).

166. *See id.* at 608-09, 728 A.2d at 186.

B. *Kidnapping: How Far is Enough? Maryland Adopts the Majority's Approach Toward the Asportation Element of Kidnapping*

In *State v. Stouffer*,[1] the Court of Appeals considered whether the asportation element of Maryland's kidnapping statute was incidental to the murder of a kidnapping victim and, if felony murder, the kidnapping being the underlying felony, was supported by sufficient evidence.[2] The Court of Appeals adopted the majority approach by examining the circumstances surrounding the kidnapping, including the time and the quality of the victim's confinement, as well as the asportation of the victim.[3] The Court of Appeals correctly joined the majority approach; by weighing the circumstances surrounding the kidnapping, Maryland courts will be more in tune with the intent of modern kidnapping statutes.[4]

1. The Case.—On February 27, 1989, Jeffrey Fiddler was found dead near an entrance ramp of Interstate 81 near the Maryland-Pennsylvania border.[5] Fiddler had two stab wounds to the chest, defensive wounds on the back of his right hand, and abrasions on his buttocks and left leg.[6] When found, he was wearing a sweatshirt, pants, no underwear, and unlaced shoes.[7] Grass and leaves were found on the bottom of Fiddler's left foot, and a greasy, granular material was found on his back.[8]

The medical examiner opined:

> (1) Fiddler died of the large stab wound to the chest, which punctured a lung; (2) that wound would have caused extensive bleeding; (3) the stabbing did not occur where the body was found; (4) Fiddler was probably wearing the sweatshirt, but not the pants or shoes, when stabbed; (5) the pants and shoes were placed back on the body after the stabbing; (6) before Fiddler died and without his pants on, his body had been dragged across a rough granular black surface; and (7) death was not instantaneous, but ensued from bleeding within a half hour after the stabbing.[9]

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1. 352 Md. 97, 721 A.2d 207 (1998).
2. *Id.* at 99, 721 A.2d at 208.
3. *Id.* at 113, 721 A.2d at 215.
4. *See infra* notes 113-119 (exploring the focus of modern kidnapping statutes).
5. *Stouffer*, 352 Md. at 100, 721 A.2d at 209.
6. *See id.* at 101, 721 A.2d at 209.
7. *See id.* at 100-01, 721 A.2d at 209. Incidentally, it was not Fiddler's common practice to not wear underwear or to go without tying his shoes. *See id.* at 101, 721 A.2d at 209.
8. *See id.* at 101, 721 A.2d at 209.
9. *Id.* Very little blood was found in the ditch, supporting the fact that the stabbing occurred elsewhere. *See id.*

Very little direct evidence was available for trial,[10] partly because six years had passed between the crime and the indictment of Charles Stouffer.[11] Apparently, Stouffer was part of a community of twenty- to thirty-year-olds who socialized and partied together.[12] Part of this group conducted criminal activity, which included drugs and weapons, out of a pizza place called Rocky's pizza.[13] There was evidence that Fiddler may have been killed because he was revealing too much information about the criminal activity occurring at Rocky's.[14] There was also some evidence that Stouffer and others intended to frighten Fiddler, to quiet him, but events grew out of control.[15] Other evidence suggested that "Stouffer and others were simply upset over attention Fiddler was paying to one 'Becky.'"[16]

The State's theory was that Stouffer and his accomplices chased and then kidnapped Fiddler in Hagerstown.[17] According to the State, they then took him to a field, forced him to partially disrobe and then, possibly to avoid his escape, stabbed him in the chest.[18] Stouffer and Burral then allegedly put a bleeding Fiddler in the trunk of Stouffer's car and drove to the Maryland-Pennsylvania border, where they dumped his body.[19] The State claimed that Fiddler was still alive when Stouffer and his accomplices drove away.[20] Stouffer claimed, however, that Fiddler was simply moved to facilitate his beating and was not part of a kidnapping.[21]

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10. *See id.* at 100, 721 A.2d at 208. No weapon was recovered; no fingerprints were found linking Stouffer to the crime scene; no confessions were made; and no one actually claimed to have witnessed the kidnapping. *See id.* Three of Fiddlers' hairs and a non-identifiable blood trace was found in Stouffer's car, but the evidence could not conclusively place Fiddler's injured body in Stouffer's car. *See id.* at 102, 721 A.2d at 209.

11. *See id.* at 99, 721 A.2d at 208. William Burral, one of Stouffer's accomplices, was also tried and convicted for second degree murder and sentenced for 30 years. *See* Burrall v. State, 352 Md. 707, 724 A.2d 67 (1999), *cert. denied*, 528 U.S. 832 (1999).

12. *See Stouffer*, 352 Md. at 99, 721 A.2d at 208.

13. *See id.* at 99-100, 721 A.2d at 208.

14. *See id.* at 100, 721 A.2d at 208.

15. *See id.*

16. *Id.*

17. *See Stouffer*, 352 Md. at 101, 721 A.2d at 209.

18. *See id.* at 101, 721 A.2d at 209. Patricia Moore, a friend of Stouffer, gave a statement that Stouffer admitted to her that he had helped beat Fiddler and had ridden around in a car with him. *See id.* at 103, 721 A.2d at 210. She claimed Stouffer said that there was a struggle, where Fiddler tried to escape and that this is where the stabbing took place. *See id.* Moore later disavowed her statement at trial, but it was admitted into evidence. *See id.*

19. *See id.* at 101, 721 A.2d at 209. Three of Fiddler's hairs were found in the back of Stouffer's car, along with a non-identifiable blood trace on the inside of the car door. *Id.* at 102, 721 A.2d at 209.

20. *See id.* at 101, 721 A.2d at 209.

21. *See id.* at 104, 721 A.2d at 210-11.

Charles Edward Stouffer was convicted by the Circuit Court of Washington County of kidnapping and felony murder.[22] Kidnapping was the underlying felony for the felony murder conviction. The Court of Special Appeals affirmed in part and reversed in part.[23] The intermediate appellate court held that the "evidence indicate[d] the homicide was not committed in perpetration of the underlying felony" and thus reversed the judgment of conviction for felony murder.[24] The Court of Appeals granted certiorari to consider if the separate convictions for kidnapping and felony murder, with the kidnapping being the underlying felony of the felony murder, were supported by sufficient evidence.[25]

2. *Legal Background.*—

a. Kidnapping.—

(1) The Maryland Kidnapping Statute.—In Maryland, kidnapping is a felony defined by Maryland Code Article 27, section 337 (1957), which states:

> Every person, his counselors, aiders or abettors, who shall be convicted of the crime of kidnapping and forcibly or fraudulently carrying or causing to be carried out of or within this State any person . . . with intent to have such person carried out of or within this State, or with the intent to have such person concealed within the State or without the State, shall be guilty of a felony and shall be sentenced to the penitentiary for not more than thirty years.

Maryland's kidnapping statute has been interpreted to require false imprisonment plus some asportation of the victim.[26] Under Maryland law, "[c]ommon law false imprisonment is the unlawful detention of a person against his will,[27] and [k]idnapping adds the requirement of 'carrying the victim to some other place.'"[28] Thus,

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22. *See id.* at 97, 721 A.2d at 207. The jury acquitted Stouffer of first degree premeditated murder. *See id.* at 104, 721 A.2d at 210. The trial court imposed a life sentence for the felony murder conviction and a thirty-year sentence for the kidnapping conviction. Stouffer v. State, 118 Md. App. 590, 596, 702 A.2d 861, 864 (1997).

23. *Stouffer*, 118 Md. App. at 596, 703 A.2d at 864.

24. *Id.* at 596, 703 A.2d at 864; *see infra* notes 88-100 and accompanying text (discussing the felony murder charge).

25. *Stouffer*, 352 Md. at 99, 721 A.2d at 208.

26. Johnson v. State, 292 Md. 405, 432, 439 A.2d 542, 558 (1982); *see also* Paz v. State, 125 Md. App. 729, 739, 726 A.2d 880, 884 (1999) (requiring false imprisonment plus asportation).

27. *Paz*, 125 Md. App. at 739, 726 A.2d at 884 (citing Midgett v. State, 216 Md. 26, 38-39, 139 A.2d 209 (1958)).

28. *Id.* (quoting *Johnson*, 292 Md. at 432, 439 A.2d at 439).

kidnapping in Maryland is false imprisonment plus some movement of the victim.[29]

Maryland's kidnapping statute broadens the common law definition of kidnapping. The legislative intent behind enacting the statute was to broaden the common law definition of kidnapping from moving a victim from one country to another to include intra-state movement (a movement only in Maryland).[30]

Kidnapping also has an intent requirement. There are two ways to form the requisite mens rea to kidnap in Maryland: (1) an intent to carry the victim to another place or (2) an intent to conceal such victim in or out of the State.[31]

(2) The Asportation Element of Kidnapping: How Far is Enough?—Recently, other jurisdictions have recognized that some crimes, such as assault and rape, have an asportation merely incidental to the commission of the crime.[32] In other words, the perpetrator usually moves the victim in the normal course of committing the crime, and thus kidnapping should not apply. Jurisdictions that do not recognize the merely incidental movement as kidnapping have been described as using the "majority view" while jurisdictions that read the statute literally have been described as using the "traditional rule."[33]

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29. *See id.* (citing Tate v. State, 32 Md. App. 613, 615, 363 A.2d 622, *cert. denied*, 278 Md. 736 (1976)) (stating that false imprisonment is a lesser included offense of kidnapping and if kidnapping is proved, false imprisonment is also proved).

30. McGrier v. State, 125 Md. App. 759, 769, 726 A.2d 894, 899 (1999); *see also* Lester v. State, 9 Md. App. 542, 544, 266 A.2d 361, 363 (1970) (citing Hunt v. State, 12 Md. App. 286, 278 A.2d 637 (1971)) (stating the definition for kidnapping as "the forcible abduction or carrying away of a man, woman or child from their own country into another country") (citation omitted). The legislature wanted "to include the forcible or fraudulent carrying, or intent to carry a person within as well as without the State." *Id.*; *see infra* section 4.b (examining the history of the kidnapping statute).

31. *See* MD. CODE ANN. art. 27, § 337 (1957); *see also Lester*, 9 Md. App. at 544, 266 A.2d at 363.

32. *See generally* Frank J. Wozniak, Annotation, *Seizure or Detention for Purpose of Committing Rape, Robbery, or Other Offense as Constituting Separate Crime of Kidnapping*, 39 A.L.R. 5th 283 (1996) (illustrating how jurisdictions differ in their approach to the asportation element).

33. *See Stouffer*, 352 Md. at 106, 721 A.2d at 211 (traditional view); *id.* at 109, 721 A.2d at 213 (majority view); *see also* Government of Virgin Islands v. Berry, 604 F.2d 221, 225 (3d Cir. 1979) (citing People v. Chessman, 238 P.2d 1001, 1017 (Cal. 1952), and illustrating the traditional rule by stating, "it is the fact, not the distance, or forcible removal which constitutes kidnapping in this state"); 1988-DEC Army Law. 32, *The Military's Anomalous Kidnapping Laws* (1988) (arguing against military prosecutors having the discretion to charge the accused under either the traditional or majority view of kidnapping).

(i) The Traditional View.—According to the traditional rule, *any* asportation of the victim, no matter how short the distance, is sufficient to establish the crime of kidnapping.[34] In jurisdictions that follow this rule, courts read the kidnapping statute literally and focus on the forcible removal and not its distance to constitute the crime of kidnapping.[35]

(ii) The Majority View.—The majority of jurisdictions follow the "majority view."[36] The majority view is that "kidnapping statutes do not apply to unlawful confinements or movements 'incidental' to the commission of other felonies."[37] The policy behind this approach is to prevent overzealous enforcement of the kidnapping statutes.[38] The Court of Special Appeals in *McGrier* noted that Maryland's kidnapping statute carries a severe maximum sentence of thirty years incarceration.[39] The court further warned that kidnapping is usually a "prelude to some other crime" and to interpret the statute broadly might allow a thirty-year sentence for more minor crimes such as "assault, transporting persons for purposes of prostitution, petty street crimes, and minor sex offenses."[40]

Other courts have noted the significant penalties of a kidnapping conviction and the chance of kidnapping to "overrun other crimes such as robbery, rape, and assault."[41] In Cotton, a labor strike grew out of hand and a victim was moved between ten and fifteen feet.[42] The California court was not willing to recognize the "incidental" movement as enough to constitute kidnapping.[43] Thus, as a safeguard, courts usually will not apply the kidnapping statute if the movement was merely incidental to the commission of another offense.[44]

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34. *See, e.g., Stouffer*, 352 Md. at 106, 721 A.2d at 211 (citing *Berry*, 604 F.2d at 225).

35. *See, e.g., id.*

36. Wozniak, *supra* note 32, at 356.

37. *Id.*

38. *See Stouffer*, 352 Md. at 107, 721 A.2d at 212; *see also* McGrier v. State, 125 Md. App. 759, 769, 726 A.2d 894, 899 (1998) (expressing concern for imposing the harsher kidnapping sentences for lesser crimes with inherent movements).

39. *McGrier*, 125 Md. App. at 769, 726 A.2d at 899.

40. *Id.*

41. *Stouffer*, 352 Md. at 107, 721 A.2d at 212 (quoting Cotton v. Superior Court, 364 P.2d 241, 244 (Cal. 1961)).

42. *Cotton*, 364 P.2d at 244.

43. *Id.* A recent California decision upheld *Cotton*, stating "the central thrust of *Cotton* is contained in our reasoning that the Legislature did not intend to apply criminal sanctions where the 'slightest movement' is involved." People v. Reed, 92 Cal. Rptr. 2d 781, 788 (Ct. App. 2000) (citing *Cotton*, 364 P.2d at 244).

44. *See McGrier*, 125 Md. App. at 769, 726 A.2d at 899. According to an annotator, a New Jersey court has

Thus, as a safeguard, courts usually will not apply the kidnapping statute if the movement was merely incidental to the commission of another offense.[45]

As a result, the majority view has evolved and appears in three different tests.[46] The first asks "whether the confinement, movement, or detention was merely incidental to the accompanying felony or whether it was significant to warrant independent prosecution."[47] The second, adds an additional inquiry of "whether the detention or movement substantially increased the risk of harm over and above that necessarily present in the accompanying felony."[48] The third examines the resulting movement or confinement which:

> (1) must not be slight, inconsequential, and merely incidental to the other crime; (2) must not be the kind inherent in the nature of the other crime; and (3) must have some significance independent of the other crime, in that it makes the other crime substantially easier to commit or substantially lessens the risk of detection.[49]

b. The Felony Murder Rule.—Felony murder in Maryland is any murder that is committed during the perpetration or attempt to perpetrate a felony.[50] Article 27, section 410 of the Maryland Annotated Code states that any "murder which shall be committed in the perpetration of, or attempt to perpetrate, any . . . kidnapping as defined in §§ 337 and 338 of this article . . . shall be murder in the first degree."[51] The purpose of the felony murder rule is to hold felons strictly liable for the deaths that they commit in the perpetration of a

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> pointed out that kidnapping, which was only a misdemeanor at common law, has become in modern legislation one of the most severely punished offenses . . . . It was desirable to restrict the scope of kidnapping, as an alterative or cumulative treatment of behavior whose chief significance was robbery or rape because the broad scope of this overlapping offense had given rise to serious injustice.

Wozniak, *supra* note 32, at 355-56 n.3 (citing State v. Tronchin, 539 A.2d 330 (1988)).

45. *See generally* Wozniak, *supra* note 32; McGrier v. State, 125 Md. App. 759, 769, 726 A.2d 894, 899 (1999).

46. Wozniak, *supra* note 32, at 357.

47. *Id.*

48. *Id.*

49. *Id.* The Model Penal Code also requires a "substantial" confinement or a "substantial" movement of the victim. MODEL PENAL CODE § 212.1 (1998).

50. MD. ANN. CODE, art. 27, § 410 (1997 Cum. Supp.). Felony murder falls under the common law crime of murder and § 410 divides the common law crime of murder into degrees for purposes of punishment. *See* Bruce v. State, 317 Md. 642, 645, 566 A.2d 103, 104 (1989); *see also* Campbell v. State, 293 Md. 438, 441, 444 A.2d 1034, 1036 (1982) (citing Jackson v. State, 286 Md. 430, 435-36, 408 A.2d 711, 715 (1979) and stating that the felony murder doctrine has not been abrogated by statute in Maryland).

51. MD. ANN. CODE art. 27, § 410.

crime.[52] The statute was also designed to relieve the State of its burden to prove the intent to kill when a person commits felonious conduct that results in death.[53]

To establish felony murder, there must be some connection between the underlying felony and the death.[54] The felony and death cannot simply coexist in time by mere coincidence, but there has to be some causal connection.[55] The Court of Appeals in *Campbell v. State* defines the connection in terms of proximate cause.[56] *Campbell* requires proof of something more than the Tort theory of proximate cause,[57] stating "[b]ecause of the extreme penalty attaching to a conviction of felony murder, a closer and more direct causal connection between the felony and the killing is required."[58] With the victim's liberty at stake, as compared to Tort liability, courts now require a stronger connection.[59] Thus, in terms of kidnapping, to prove felony murder during the commission of a kidnapping, the state would need to connect the killing with an element of the kidnapping—moving or imprisoning the victim.

3. The Court's Reasoning.—In *Stouffer*, the Court of Appeals adopted the majority approach to reading the asportation element of kidnapping statutes.[60] In doing so, the court rejected the Court of Special Appeals's "overarching intent standard," focusing instead on the independent intent to kidnap the victim.[61]

To explain its shift in focus, the court outlined the State's theory and the defendant's theory of the case. The State's theory was that Fiddler was moved from Hagerstown to the field with the intent of beating him in order to teach him a lesson.[62] Defendant's theory was

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52. *Campbell*, 293 Md. at 450, 444 A.2d at 1041.

53. *See* Whittlesey v. State, 326 Md. 502, 521, 606 A.2d 225, 234 (1992) (citing Bruce v. State, 317 Md. 642, 645, 566 A.2d 103 (1989)).

54. *See Stouffer*, 352 Md. at 116, 721 A.2d at 216; *see also* Watkins v. State, 357 Md. 258, 272, 744 A.2d 1, 8 (2000) (requiring that "there be some nexus between the killing and the underlying felony" (citing *Stouffer*, 352 Md. at 116, 721 A.2d at 216)).

55. *See, e.g.*, Mumford v. State, 19 Md. App. 640, 644, 313 A.2d 563, 566 (1974) (holding that more than a mere coincidence in time and place must be shown to prove felony murder).

56. *Campbell*, 293 Md. at 450-51, 444 A.2d at 1041.

57. *Id.* The Court of Appeals stated that "[t]ort law is primarily concerned with who shall bear the burden of loss, while criminal law is concerned with the imposition of punishment." *Id.* at 451, 444 A.2d at 1041.

58. *Id.* (citations omitted).

59. *See id.*

60. *Stouffer*, 352 Md. at 113, 721 A.2d at 215.

61. *Id.* at 115, 721 A.2d at 216.

62. *See id.* at 104, 721 A.2d at 210.

that Fiddler was moved to a place to facilitate his beating and that an asportation for that purpose did not constitute kidnapping.[63] The issue presented for the court was "whether the asportation of Fiddler, while still alive, was simply to facilitate the assault, or murder, and did not, therefore, constitute the separate crime of kidnapping."[64]

To reach the question of kidnapping, Fiddler needed to be alive when the asportation occurred. The Maryland kidnapping statute speaks in terms of carrying "any person" and the court assumed that a corpse is not a "person" under the statute.[65] It was, therefore, important for the court to determine whether Fiddler was still alive during the perpetration of the kidnapping.[66] The Court of Appeals found two reasonable inferences of asportation of a live victim: one from the initial point of abduction and the other from the place of the beating to the Maryland-Pennsylvania border.[67]

The court then discussed the variety of cases and different approaches in examining "whether, and under what circumstances, the detention, confinement, or asportation of a victim initially accosted for the purpose of robbery, sexual assault, or some other crime will suffice to sustain a separate conviction for kidnapping."[68] The court stressed the need for a careful review of precedent and persuasive decisions because similar kidnapping regulations varied in degree and breadth.[69] Providing a detailed analysis of such regulations, the court determined that "Maryland's statute requires a 'carrying [of the victim]' and is not divided into degrees."[70]

a. Shifting Away from the Traditional Rule.—The court examined the traditional rule, where any asportation, no matter how short the distance, is enough to establish the crime of kidnapping.[71] The court relied on an example from a Connecticut case where a

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63. *See id.*, 721 A.2d at 210-11. Defendant also contended that transporting a dead body would not constitute kidnapping. *Id.*, 721 A.2d at 211.

64. *Id.* at 104-05, 721 A.2d at 211.

65. *Id.* at 105, 721 A.2d at 211.

66. *Id.*

67. *Id.* The court stressed that the testimony of the medical examiner and the fact that Stouffer lived for up to thirty minutes after the stabbing was indicative that he was alive for at least part of the time while being driven to the border. *Id.*

68. *Id.* at 106, 721 A.2d at 211; *see also supra* note 32, at 283 (cataloguing the variety of approaches).

69. *Stouffer*, 352 Md. at 106, 721 A.2d at 211. The court noted that some statutes are similar to false imprisonment, others include "taking" of a person, some include both taking and confinement and some are further divided into degrees or dependent on defendant's mental state or objective, such as ransom. *Id.*

70. *Id.*

71. *Id.*

clerk was moved a short distance, at knifepoint, to the back of a grocery store.[72] Here, the Court of Appeals noted, under the traditional rule, a court would likely find kidnapping.[73] By advocating a literal interpretation of a kidnapping statute, the traditional rule analysis considers the forcible removal of a victim during the commission of a felony to be a separate crime.[74]

Recognizing the validity of these concerns, the court then discussed other jurisdictions, concluding that most of them hold that "kidnapping statutes do not apply to unlawful confinements or movement 'incidental' to the commission of other felonies."[75] Such a literal reading of the kidnapping statute could lead to overzealous enforcement, however, with "persons who have committed such substantive crimes as robbery or assault—which inherently involve the temporary detention or seizure of the victim—will suffer the far greater penalties prescribed by the kidnapping statutes."[76] Under the majority rule, some crimes inherently involve movement of a victim. Simply put, many courts now believe that the traditional kidnapping rule has the potential to "'overrun' other crimes, such as robbery, rape and assault."[77]

Examining the various applications of the majority rule, the court identified two methods of applying the majority approach— a rigid method and a flexible method.[78] According to the court, such circumstances include: "how long the victim was held, how far the victim was taken, where the victim was taken, whether the abduction exceeded what was necessary to the commission of the other crime and whether the abduction itself substantially increased the risk of harm beyond the risk inherent in the commission of the other crime."[79] In contrast, the court noted very few courts have applied the rigid approach, which is the antithesis of the traditional rule in that it finds

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72. *Id.* at 106, 721 A.2d at 212 (citing State v. Vass, 469 A.2d 767 (Conn. 1983)).

73. *Id.*

74. *Id.* at 107, 721 A.2d at 212.

75. *Id.* (citing Wozniak, *supra* note 32, at 356).

76. *Id.* (internal quotation marks omitted) (quoting Government of Virgin Islands v. Berry, 604 F.2d 221, 226 (3d Cir. 1979)).

77. *Id.* (quoting Cotton v. Superior Court, 364 P.2d 241, 244 (Cal. 1961)).

78. *Id.* (flexible method); *id.* at 107 n.2, 721 A.2d at 212 n.2 (rigid method). *See generally* Wozniak, *supra* note 32, at 283. Almost all of the courts use the flexible standard, which scrutinizes the circumstances surrounding the confinement or movement.

79. *Stouffer*, 352 Md. at 108, 721 A.2d at 212 (citing State v. Farmer, 445 S.E.2d 759 (W. Va. 1994); State v. St. Cloud, 465 N.W.2d 177 (S.D. 1991).

almost any movement as incidental or inherent to the underlying felony.[80]

The court then considered a variety of standards or guidelines devised by courts in formulating the majority, flexible standard. Some courts have focused on "distance, duration, and danger."[81] Other courts have examined:

> (1) the duration of the detention or asportation; (2) whether the detention or asportation occurred during the commission of a separate offense; (3) whether the detention or asportation which occurred is inherent in the separate offense; and (4) whether the asportation or detention created a significant danger to the victim independent of what posed by the separate offense.[82]

The court also cited a three-part test from Kansas that examines

> whether the movement or confinement was "slight, inconsequential," whether it was "of the kind inherent in the nature of the crime," and whether it has "some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection."[83]

Through its review of other courts' applications of the majority rule, the court found that most majority applications were "fact specific."[84] As stated by the court, "[w]hether the confinement or movement of the victim is merely incidental to another crime depends, in nearly every case, on the circumstances."[85] The court then identified factors, which if found missing, increase the prospect of the court reversing a separate kidnapping conviction:

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80. *Id.* at 107 n.2, 721 A.2d at 212 n.2 (citing People v. Levy, 15 N.Y.2d 159 (N.Y. 1965), in which no kidnapping was found where during the course of a robbery, the victim was confined over 20 minutes and driven over 27 blocks). The rigid view does not consider the circumstances (e.g., the distance the victim was held and the time he/she was confined). *See id.* New York later moved away from the rigid, majority standard and now considers the circumstances surrounding the kidnapping. People v. Miles, 245 N.E.2d 688, 695 (N.Y. 1969)).

81. *Stouffer*, 352 Md. at 108, 721 A.2d at 213.

82. *Id.* at 108-09, 721 A.2d at 213 (internal quotation marks omitted) (quoting Government of Virgin Islands v. Berry, 604 F.2d 221, 227 (3d Cir. 1979)). The Eleventh Circuit adopted an identical test. *See id.* (citing United States v. Howard, 918 F.2d 1529 (11th Cir. 1990)).

83. *Stouffer*, 352 Md. at 109, 721 A.2d at 213 (quoting State v. Buggs, 547 P.2d 720, 731 (Kan. 1976)). Delaware and Florida also have adopted this test. *See id.* at 108, 721 A.2d at 213 (citing Burton v. State, 426 A.2d 829 (Del. Supr. Ct. 1981); Faison v. State, 426 So. 2d 963 (Fla. 1983)).

84. *Id.* at 110, 721 A.2d at 213.

85. *Id.*

> If the victim is not moved too far, is not held for longer than is necessary to complete the other crime, and is not subjected to any significant peril from the confinement or movement itself, if the confinement or movement can reasonably be viewed as undertaken solely to facilitate the commission of the other crime, and if commission of the other crime normally involves (even if it does not legally require) some detention or asportation of the victim.[86]

The court then considered how kidnapping has been interpreted through Maryland case law. In two early cases,[87] the court hinted at a rule that resembled the majority approach. According to the court, both cases discussed the possibility of kidnapping being "incidental" or an "integral part" of another crime, but "the facts of each case justified separate kidnapping convictions."[88] The court then cited another line of Maryland cases that followed the traditional rule where the fact of asportation and not the distance or the circumstances was controlling.[89] The most striking example was *Carey v. State*,[90] where the court applied the traditional rule to find kidnapping where the victim was moved from the upstairs and locked in the basement for one day.[91] Thus, Maryland courts have been inconsistent in applying either the modern or traditional rules.

The court then considered the competing policy constraints of limiting overzealous prosecution and the fact that kidnapping usually accompanies other crimes. On one hand, the kidnapping statute could transform "a host of lesser-punished sex and street crimes into 30-year eligible kidnappings," and "the Legislature [never] intended for § 337 to be read in that broad a fashion."[92] On the other hand,

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86. *Id.*, 721 A.2d at 213-14.

87. *See* Lester v. State, 9 Md. App. 542, 266 A.2d 361 (1970) (stating that the court would not reach the issue if the movement was "incidental" because there was ample evidence of defendant's intent to kidnap the victim and to have a hostage, separate from his intent to consummate a rape); Rice v. State, 9 Md. App. 552, 267 A.2d 261 (1970) (differentiating between a slight movement and the defendant dragging the victim several blocks to confine her in his apartment).

88. *Stouffer*, 352 Md. at 111, 721 A.2d at 214; *see supra* note 116 (discussing the two cases).

89. *Stouffer*, 352 Md. at 111, 721 A.2d at 214 (citing Moore v. State, 23 Md. App. 540, 329 A.2d 48 (1974) and rejecting the defendant's complaint that the state did not prove how far the victim was moved, instead focusing on the fact that the victim was moved).

90. 54 Md. App. 448, 458 A.2d 90, *aff'd*, 299 Md. 17, 472 A.2d 444 (1984).

91. *Stouffer*, 352 Md. at 111, 721 A.2d at 214 (citing *Carey*, 54 Md. App. at 452, 458 A.2d at 92).

92. *Id.* at 112-13, 721 A.2d at 215.

the court needed to balance the threat of "overzealous enforcement" with the fact that kidnappings rarely occurred in and of themselves.[93]

As a result, the court joined the majority view, urging a case-by-case analysis with a "focus on those factors that seemed to be central to most of the articulated guidelines."[94] Those factors included:[95]

> 1. How far, and where, was the victim taken?
> 2. How long was the victim detained in relation to what was necessary to complete the crime?
> 3. Was the movement either inherent as an element, or, as a practical matter, necessary to the commission of the other crime?
> 4. Did it have some independent purpose?
> 5. Did the asportation subject the victim to any additional significant danger?[96]

The court then applied these factors to *Stouffer* and concluded that the "evidence sufficed to sustain a separate kidnapping conviction."[97] First, the fact that Stouffer was driven, as far as a field outside Hagerstown, in contrast to being dragged into a nearby alley, was enough to make the distance "considerable."[98] Second, based on the "considerable" distance Stouffer was moved, the court had difficulty accepting Stouffer's theory that his group was only trying to beat Fiddler because "Fiddler could have been beaten anywhere."[99] In contrast, if Stouffer meant to scare Fiddler then Fiddler's asportation, coupled with the fact that he was stripped partially naked in a field, would be proof of this purpose.[100] Under either theory, the court considered being "forced into a compact car with three or four other men and driven for some distance as a hostage" and the fact that Fiddler was isolated in a field, with no hope of escape, as subjecting Fiddler to additional, significant danger.[101]

The court also focused on the fact that Fiddler was not released after the beating in the field. Kidnapping is a continuous crime, and does not cease until the "victim's liberty . . . is restored."[102] According

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93. *Stouffer*, 352 Md. at 113, 721 A.2d at 215.
94. *Id.*
95. *Id.*
96. *Id.*; *see also* McGrier v. State, 125 Md. App. 759, 726 A.2d 894 (1998).
97. *Stouffer*, 352 Md. at 113, 721 A.2d at 215.
98. *Id.*
99. *Id.*
100. *See id.*
101. *Id.*
102. *Id.* at 114, 721 A.2d at 215 (internal quotation marks omitted) (quoting State v. Gomez, 622 A.2d 1014, 1016 (Conn. 1993)).

to the medical examiner, Fiddler was alive for up to about thirty minutes after the stabbing.[103] The court used this continuation of the kidnapping to question Stouffer's theory that he meant only to beat Fiddler. The court considered the second movement of Fiddler as evidence that the kidnapping "was certainly not merely incidental to the beating."[104]

Having established the underlying felony of kidnapping, the court next examined the felony murder charge. The court contrasted the jury's finding that the death of Fiddler occurred during the commission of the kidnapping with the Court of Special Appeals' reversal on the grounds that Stouffer's "'overarching intent' was not to kidnap Fiddler but to simply beat him."[105] The court disagreed with both the Court of Special Appeals and Stouffer's brief, which stated "[t]he beating that culminated in the fatal stabbing was not done to further the kidnapping; rather, the kidnapping was carried out to further the beating. As a result, there was no felony murder."[106]

Because Maryland's felony murder statute requires a nexus between the underlying felony and the murder,[107] the court continued its application of the flexible modern rule by examining "whether the evidence sufficed to show that Fiddler was murdered 'in the perpetration of' a kidnapping."[108] The court resolutely concluded that "Fiddler was stabbed in order to prevent his escape" in furtherance of the kidnapping.[109] The court determined that the "overarching intent" standard that the Court of Special Appeals applied was irrelevant be-

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103. *Id.* at 101, 721 A.2d at 209.

104. *Id.* at 114, 721 A.2d at 215-16.

105. *Id.* at 114-15, 721 A.2d at 216. In *Stouffer v. State*, the Court of Special Appeals found

> no direct or inferential evidence before the trier of fact that the announced purpose of Stouffer's mission—to scare Fiddler—was to be accomplished by forcibly confining and transporting him . . . the means to be employed in intimidating Fiddler . . . was the infliction of serious bodily harm in a reckless and dangerous manner with indifference to the consequences.

118 Md. App. 590, 619, 703 A.2d 861, 875-76 (1997).

106. *Stouffer*, 352 Md. at 115, 721 A.2d at 216.

107. *See id.* at 116, 721 A.2d at 216; *see also* Watkins v. State, 357 Md. 258, 272, 744 A.2d 8-9 (2000) (stating that "mere coincidence between the underlying felony and the killing is not enough; the conduct causing death must be in furtherance of the design to commit the felony"); MD. CODE ANN., art. 27, § 410 (1997 Cum. Supp.) (stating that all murder committed "in the perpetration of, or attempt to perpetrate, any . . . kidnapping as defined in § 337 [is] . . . murder in the first degree").

108. *Stouffer*, 352 Md. at 116, 721 A.2d at 216.

109. *Id.*, 721 A.2d at 216-17.

cause whatever motive Stouffer had, there was an independent intent to kidnap Stouffer.[110]

The Court of Appeals is able to find felony murder on two theories. The first is that kidnapping is a continuous crime until the victim's liberty is released.[111] Because Fiddler was never released, he was murdered in the perpetration of the kiidnapping.[112] The second theory is that the kidnapping was intended to teach Fiddler a lesson.[113] Thus, the beating was intended to further the kidnapping.[114] The court determined that either theory was sufficient to reverse the Court of Special Appeals and affirm the Circuit Court's felony murder conviction.[115]

4. Analysis.—By adopting the modern rule in *Stouffer*, the Court of Appeals is now more in tune with the harms that modern kidnapping statutes are meant to prevent. By minimalizing the traditional rule's strict attention to asportation, *Stouffer* better applies the modern kidnapping statute.

a. The Majority Rule better Enforces the Modern Kidnapping Statute.—The traditional rule has an antiquated application in a modern time, and the majority rule better enforces the harms the modern kidnapping statute is meant to prevent.[116] The harms kidnapping is meant to prevent have changed between common law kidnapping and recent kidnapping statutes. Under common law, kidnapping was designed to prevent the taking of a person from his own country and sending him into another.[117] The main focus of the law was to punish "the unlawful carrying away of victims out of the country to obtain

110. *Id.*

111. *See id.*, 721 A.2d at 217.

112. *See id.*

113. *See id.* at 116-17, 721 A.2d at 217.

114. *See id.* at 117, 721 A.2d at 217; *see also supra* notes 17-21. This is the opposite theory of what the Defendant suggests. Instead of kidnapping to perpetrate the beating, the beating was done to further the kidnapping.

115. *Stouffer*, 352 Md. at 117, 721 A.2d at 217.

116. *See generally* John L. Diamond, *Kidnapping: A Modern Definition*, 13 AM. J. CRIM. L. 1, 1 (1985) (arguing that the "metaphysics of asportation" should be de-emphasized and the court should focus on the time and quality of the victim's imprisonment).

117. *See id.* at 2 (citing R. PERKINS & R. BOYCE, CRIMINAL LAW 229 (3d ed. 1982)); *see also* Midgett v. State, 216 Md. 26, 38, 139 A.2d 209, 215 (1958).

labor for American colonization."[118] Thus, asportation was a key element in elevating the crime of imprisonment to kidnapping.[119]

Modern kidnapping statutes extend the common law definition to a carrying in or out of state.[120] Thus, the focus of the crime is localized and is no longer limited to a victim being transported out of the country.[121] Because minimum movements are recognized to satisfy the asportation element of kidnapping, this shift of focus reflects the statute's intent to prevent substantial isolation of and danger to a person.[122]

In addition, modern society is mobile and most criminals have access to transportation.[123] Thus, in terms of kidnapping, asportation is much more prevalent because of the intrastate nature of the statute and easier access to transportation. Focusing on the movement of a victim should not be the sole approach.[124] Rather, the circumstances surrounding the kidnapping need to be considered, and the majority rule allows this approach.

In its rationale for rejecting the traditional rule and adopting the modern, the court acknowledges the need to look beyond the asportation of the victim. First, the court rejects the traditional rule because fixating on "any asportation" will have the practical effect of "overrunning" lesser crimes.[125] The court also rejects the majority-rigid rule,[126] because it has the opposite effect, and being too lenient, allows for injustice.[127] The court noted that in almost every jurisdiction

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118. Diamond, *supra* note 116, at 35. Maryland's early kidnapping statutes were concerned with out-of-state carrying and the selling of slaves entitled to freedom after a term of years. *See* 1809 Md. Laws 575 (creating a two- to ten-year penalty for the forcible and fraudulent carrying out of state); *see also* 1817 Md. Laws 659 (not allowing slaves entitled to freedom after a term of years to be sold out of state).

119. Diamond, *supra* note 116, at 35; *see also Midgett*, 216 Md. at 38-40, 139 A.2d at 215-16 (noting that Maryland still uses asportation as the distinction between false imprisonment and kidnapping and other jurisdictions abolish this distinction).

120. *See supra* notes 116-119; *see also* Note, *A Rationale of the Law of Kidnapping*, 53 COLUM. L. REV. 540 (1953) (noting how in the 1920s kidnapping was expanded to include extortion). In 1933, Maryland repealed its kidnapping statute of 1924 and allowed for an inter or intra state carrying of the victim. 1933 Md. Laws 1122.

121. *Midgett*, 216 Md. at 38, 139 A.2d at 216.

122. Diamond, *supra* note 116, at 34 (arguing that movement is irrelevant and that the focus of kidnapping statutes should be on the time and quality of confinement of the victim).

123. *Id.* at 35; *see also A Rationale of the Law of Kidnapping*, *supra* note 120, at 540 (showing how in the 1920s kidnapping became focused on interstate transportation of the victim and the famous Lindbergh kidnapping/extortion crime).

124. Diamond, *supra* note 116, at 34.

125. *Stouffer*, 352 Md. at 107, 721 A.2d at 212.

126. *Id.*

127. *Id.*; *see also supra* notes 34-35 (examining the rigid rule).

that follows the flexible-majority rule, courts need to examine "in nearly every case . . . the circumstances, even when guidelines . . . are applied."[128] In both the traditional and rigid-modern rules, merely focusing on the asportation in and of itself is not enough to make a decision; courts, like in *Stouffer*, need to look beyond the movement of the victim. Thus, the court acknowledged that asportation is a factor, but not necessarily the only focus.

In adopting the majority rule, the court stressed the importance of examining factors *outside* the asportation.[129] Two of the factors considered by the court examine the duration and quality of the confinement *in addition* to the movement of the victim.[130]

The first factor is "how long was the victim detained in relation to what was necessary to the commission of the other crime."[131] This may be read as examining the duration of the confinement and/or the duration of the asportation. If it is read as examining the duration of the confinement, then it no longer deals with the *movement* of the victim. In *McGrier v. State*, the Court of Special Appeals applied this factor to see if kidnapping was incidental to a rape and concluded that it was not because the duration of the *entire* confinement was limited to the time required to complete the rape.[132] Thus, the Court of Special Appeals in applying this factor looked at the duration of the *entire* confinement as opposed to focusing just on the asportation.[133]

Additionally, the Court of Special Appeals in *Paz v. State* examined the duration of the entire confinement, not just of the asportation of the victim.[134] In finding that kidnapping was incidental to rape, the court concluded that because the rape was interrupted, the victim was not detained long enough to constitute the separate crime of kidnapping.[135] The court, however, implied that if the rape had

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128. *Stouffer*, 352 Md. at 110, 721 A.2d at 213.

129. *Id.* at 110, 721 A.2d at 213-14; *see also* McGrier v. State, 125 Md. App. 759, 770, 726 A.2d 894, 899 (1998); *supra* note 121 (stating the factors).

130. *Stouffer*, 352 Md. at 110, 721 A.2d 213 (how long was the victim detained in relation to what was necessary to the commission of the other crime and did the asportation subject the victim to any additional significant danger).

131. *McGrier*, 125 Md. App. at 770, 726 A.2d at 899.

132. The total time the victim was held was about two minutes, enough for the defendant to complete the rape and for the victim to flee. *Id.* at 772, 726 A.2d at 900-01. The court also found that the victim was taken a short distance and that there was no independent purpose. *Id.*

133. *Id.* at 772, 726 A.2d at 900. The victim was briefly moved a few feet from the hallway to the basement, enough to satisfy false imprisonment, but not kidnapping. *See id.*

134. 125 Md. App 729, 740, 726 A.2d 880, 885 (1998).

135. *Id.* Defendant dragged the victim about twenty-five feet, across a street into an alleyway. *Id.* at 734, 726 A.2d at 882. The court also found kidnapping incidental to rape because the victim was not taken far. *Id.* at 740, 726 A.2d at 885.

not been interrupted, there might have been a significant enough detention to qualify for kidnapping.[136] Thus, the court was willing to consider the confinement of the victim outside the asportation.

Another factor that the *Stouffer* court established is whether the asportation subjects the victim to any additional significant danger.[137] Utilizing this factor, the court recommended that future Maryland courts look beyond the actual danger associated with the asportation itself to the quality of the confinement.[138] In dicta, the court in *McGrier* gave examples of what would meet this factor.[139] Such examples included "leaving a victim of a rape or robbery in a remote area, or locking employees in a bank vault or freezer."[140] All of these examples look at the quality of the confinement and not the asportation. In other words, they examine the victim's circumstances *after* the asportation.[141] Moreover, in *Stouffer* the court engages in comparing perils.[142] It compares the danger to Fiddler being beaten in downtown Hagerstown with the danger of being taken to a field to be beaten.[143] In its analysis, the court did not focus on the additional danger facing Fiddler during the car ride, but rather turned its attention on the quality and conditions of the confinement after the asportation.[144]

Thus, in *Stouffer* and two post-*Stouffer* cases,[145] Maryland courts have examined the duration and quality of the victim's confinement, which are circumstances outside the asportation of the victim. By adopting the modern rule, courts have been able to see beyond the

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136. *Id.*

137. *Stouffer*, 352 Md. at 113, 721 A.2d at 215.

138. *See id.* at 114, 721 A.2d at 215 (finding increased peril in being taken to a deserted field, alone at the mercy of victim's captors); *McGrier*, 125 Md. App. at 773, 726 A.2d at 901 (finding no additional danger in moving from a hallway to adjoining steps leading to basement).

139. *McGrier*, 125 Md. App. at 773, 726 A.2d at 901.

140. *Id.*

141. One may argue that these are additional dangers caused by the asportation, and thus the court is focusing on the asportation. Although, in the bank vault situation, one could imagine where employees are at work and moved an extremely short distance. Thus, the court would need to focus on the quality and duration of the confinement to sustain a kidnapping conviction.

142. *Stouffer*, 352 Md. at 114, 721 A.2d at 215.

143. *See id.* The court looks at the danger inherent in the asportation itself, "being forced into a compact car with three or four other men and driven as a hostage"; the court also considers the dangers or quality of the confinement after the asportation: "the grave peril implicit from being taken to a field somewhere, alone, completely at the mercy of his abductors." *Id.*

144. *See supra* notes 123-104 (applying the factors to *Stouffer*).

145. *See* Paz v. State, 125 Md. App. 729, 726 A.2d 880 (1998); McGrier v. State, 125 Md. App. 759, 726 A.2d 894 (1998).

asportation element to examine the underlying circumstances of the kidnapping.[146]

c. The Future of Kidnapping in Maryland.—The wisdom of the majority rule's looking past the circumstances surrounding the asportation is also recognized by the formulators of the Model Penal Code.[147] The Model Penal Code definition of kidnapping acknowledged that certain circumstances, without any asportation, should be enough to constitute kidnapping:

> A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:
>
> (a) to hold for ransom or reward, or as a shield or hostage; or
>
> (b) to facilitate commission of any felony or flight thereafter; or
>
> (c) to inflict bodily injury on or to terrorize the victim or another; or
>
> (d) to interfere with the performance of any governmental or political function.[148]

Unlike the Model Penal Code, Maryland still requires some asportation of the victim.[149] An excellent example of the difference between Model Penal Code kidnapping and Maryland's kidnapping is *Carey v. State*.[150] Carey bound and sexually assaulted his victim in an upstairs bedroom and then dragged her down two flights of stairs and locked her in a basement closet for thirty-six hours.[151] Using the traditional rule, the court stated, "it matters not that the victim was asported but a short distance."[152] Under the modern rule, this asportation might fail because the movement may be viewed as incidental to the rape.[153] To sustain the kidnapping charge, the court will need

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146. *See supra* section 4.a; *see also infra* notes 147-174.

147. MODEL PENAL CODE § 212.1 (1998).

148. *Id.*

149. *See supra* note 121.

150. 54 Md. App. 448, 458 A.2d 90 (1983), aff'd, 299 Md. 17, 472 A.2d 444 (1984).

151. *See id.* at 452, 458 A.2d at 92. Carey told the victim, "this is your cage, this is where you are going to die" as he locked her in the basement closet. *Id.*

152. *Id.* at 452, 458 A.2d at 92 (internal quotation marks omitted) (quoting Isaacs v. State, 31 Md. App. 604, 616, 358 A.2d 273 (1976)).

153. *Compare* McGrier v. State, 125 Md. App. 759, 726 A.2d 894 (1998) (movement from hallway to stairs is not sufficient) *and* Paz v. State, 125 Md. App. 729, 726 A.2d 880 (1998) (dragging a victim from a parking lot to a dark alley across the street was not sufficient)

to examine factors outside the asportation (e.g. the thirty-six-hour duration and conditions of the confinement). Under the Model Penal Code, this constitutes confinement for "a substantial period in a place of isolation."[154] The Model Penal Code acknowledges that harms kidnapping are meant to prevent are independent of the asportation of the victim.[155] Thus, both *Stouffer* and the Model Penal Code examine the circumstances surrounding the asportation.[156] The Model Penal Code, however, unlike Maryland's statute, does not require an asportation at all in some scenarios.

Perhaps the Model Penal Code's formulation of kidnapping is the next step for Maryland in the continuum of minimalizing the traditional rule's fixation on asportation of the victim. Stouffer may signal a middle ground where asportation is considered, as a factor, in determining when to impose the severe penalties that accompany a kidnapping conviction.

5. Conclusion.—The Court of Appeals was correct in adopting the majority rule and expanding its analysis to the circumstances surrounding the asportation. The modern rule better reflects the harms and goals of modern kidnapping statutes.

B. CRAIG MASON

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with Carey, 54 Md. App. 458, 458 A.2d 90 (holding that movement down two flights of stairs was sufficient under the traditional rule).

154. MODEL PENAL CODE § 212.1. A place of isolation is not a geographic location but isolation from society and its usual protections. *Id.* (citing Commonwealth v. Jenkins, 687 A.2d 836 (Pa. Super. 1996) (noting that one's own apartment may be a place of isolation). As little as thirty minutes has been found to be a substantial period of isolation. *Id.* (citing State v. La France, 569 A.2d 1308 (N.J. 1990)).

155. *See supra* notes 147-154 and accompanying text (explaining how the Model Penal Code examines the circumstances).

156. *Compare* section 4.a (arguing that the modern rule examines the entirety of the circumstances), *with* note 121.

C. Beyond the Abuser to the Enabler: Extending Criminal Liability to Caregivers who Fail to Protect a Child from Sexual Abuse by a Third Party

In *Degren v. State*,[1] the Court of Appeals examined whether an adult with the responsibility for supervising a minor child could be held criminally liable under Maryland's child abuse statute[2] for failing to prevent a third party from molesting or exploiting the child.[3] The court answered in the affirmative, and concluded that the Petitioner, Sharon Degren, was guilty of child abuse for her failure to prevent the sexual abuse of Jennifer B. while the minor child was in her care.[4] In reaching this decision the court determined that the definition of sexual abuse under the statute contemplates "not just an affirmative act in directly molesting or exploiting a child, but one's omission or failure to act" when there is a legal duty to do so and where it is reasonably possible to act.[5] The court based its broad interpretation of the statute on its legislative purpose and on the continued expansion of its scope through subsequent amendments.[6] Further support was provided by prior Maryland cases in which the court interpreted the physical child abuse statute to include a failure to act as well as an overt act.[7] The court, in reaching its decision, was also consistent with the national trend in punishing all forms of child abuse.[8] Thus, the court continues the current trend of expanding the scope of criminal liability for child abuse by allowing prosecution of not only the perpetrator of the abuse, but also of the supervising adult of the child who knowingly enables the abuse to occur.

1. The Case.—In the summer of 1996, when the victim, Jennifer, was twelve years old, Jennifer's mother made custodial arrangements

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1. 352 Md. 400, 722 A.2d 887 (1999).
2. *Id.* at 416-17; *see also* MD. ANN. CODE art. 27, § 35C (1996).
3. *Degren*, 352 Md. at 405, 722 A.2d at 889.
4. *See id.* at 428, 722 A.2d at 900.
5. *Id.* at 425, 722 A.2d at 899.
6. *See infra* notes 46-60 and accompanying text (discussing the Maryland child abuse statute and its subsequent amendments).
7. *Degren*, 352 Md. at 424, 722 A.2d at 899. The court discussed and relied upon *Pope v. State*, 284 Md. 309, 396 A.2d 1054 (1979), which restricted the class of persons to whom the child abuse statute applies to caretakers who have a mutually consensual relationship with the party legally responsible for the care of the child, and upon *State v. Fabritz*, 276 Md. 416, 425-26, 348 A.2d 275, 280-81 (1975), which interpreted the child abuse statute in cases of physical abuse to include acts of omission where one had a legal duty to act, in reaching their decision. *Id.*
8. *See Degren*, 352 Md. at 424 & n.11, 722 A.2d at 899 & n.11; *see also* Christine Adams, Note, *Mothers Who Fail to Protect Their Children From Sexual Abuse: Addressing the Problem of Denial*, 12 YALE L. & POL'Y REV. 519, 524-33 (1994) (discussing the trend in various states of increasingly holding parents criminally liable for condoning the abuse of their children).

with Sharon Degren and her husband, Nick Degren, for Jennifer to remain at their home on two separate occasions; once in June, for a period of one week, and again in August, for a period of two weeks.[9] Jennifer knew Sharon and Nick Degren and did not object to the arrangements.[10]

During the first of her visits to the Degren home, Jennifer testified that one night she fell asleep on Sharon and Nick's bed, and she awoke to Nick having sexual intercourse with her.[11] While this was occurring, Sharon was sitting on the corner of the bed "watching television and watching them."[12] When Nick asked Sharon "if she felt right with him having sexual intercourse" with Jennifer, Sharon responded that "[s]he really didn't care."[13] Nick stopped when Jennifer told him to get off of her, and Jennifer then left the room.[14] Sharon denied this event ever took place.[15]

During her visit in August, Jennifer testified that she had intercourse with Nick on two separate occasions, and that during both times Sharon was aware of the intercourse and did nothing to intervene.[16] On the first such occasion, August 10th, Sharon was in the room while Jennifer and Nick had intercourse.[17] Although Sharon acknowledged that she was present at the time her husband and Jennifer were having sex, she claimed she did not intervene because her husband could be abusive at times and she "was afraid that he would hit [her]."[18] On the second occasion, August 15th, Sharon acknowledged that she left the room as Jennifer and Nick were having intercourse.[19]

On August 14, 1996, Jennifer testified that while she was asleep in Sharon and Nick's bed, she awoke to Sharon and a male houseguest, Rick Dobsha, engaged in sex on the same bed in which she was sleep-

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9. *See Degren*, 352 Md. at 405, 722 A.2d at 889.

10. *See id.* The Degrens were friends of Jennifer's mother, and Jennifer had known them for about three years. *See id.*

11. *See id.*

12. *See id.*

13. *Id.* (alteration in original) (internal quotation marks omitted) (citation omitted).

14. *See id.*

15. *See id.* at 406, 722 A.2d at 889. Sharon claimed that the incident could not have taken place because she had not yet moved into that apartment until July. *See id.*

16. *See id.* at 406-08, 722 A.2d at 889-90.

17. *See id.* at 406, 722 A.2d at 889-90. Jennifer also alleged that after having sex with Nick, Sharon had oral sex with her. *See id.*

18. *Id.*, 722 A.2d at 890 (alteration in original) (internal quotation marks omitted) (citation omitted).

19. *See id.* at 408, 722 A.2d at 890-91.

ing.[20] Although there were several different accounts of this incident from Jennifer, Rick, and Sharon, all were in agreement that later that morning Rick had sex with Jennifer, and that Sharon was aware of this, but did nothing to intervene on the child's behalf.[21]

Sharon Degren was found guilty by a Charles County Circuit Court jury of four counts of child abuse for her involvement in the molestation of Jennifer.[22] She was sentenced to four concurrent ten-year sentences, and "[f]ive years of each sentence were suspended in favor of five years of probation."[23] In 1997, she appealed to the Court of Special Appeals.[24] In an unpublished opinion,[25] the Court of Special Appeals vacated one condition of the petitioner's probation, but affirmed the trial court's verdict in all other respects.[26] On March 24, 1998, Sharon Degren filed a Petition for Writ of Certiorari in the Maryland Court of Appeals asserting that the lower courts erred in their holding that a caretaker of a minor child may be guilty of sexual child abuse under the child abuse statute for failure to prevent the sexual molestation or exploitation of the minor child by a third party.[27] The Court of Appeals granted certiorari to resolve this issue.[28]

2. Legal Background.—Prior to the enactment of Maryland's child abuse statute, parents were held criminally responsible for the abuse inflicted by third parties based on the common law theory of criminal negligence.[29] In an effort to address this issue more effectively, the Maryland Legislature passed its first child abuse statute in 1963.[30] Subsequent amendments to the original statute, which have

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20. *See id.* at 406-07, 722 A.2d at 890.

21. *See id.* at 407, 722 A.2d at 890.

22. *See id.* at 404, 722 A.2d at 889. Sharon was charged with "four counts of child abuse, four counts of second degree rape, three counts of second degree sexual offense, one count of third degree sexual offense, and two counts of conspiracy for the involvement in the sexual molestation of Jennifer." *Id.* She was acquitted on three counts of second degree rape and three counts of second degree sexual offense. *See id.* The jury could not agree on a verdict as to one count of second degree rape, one count of third degree sexual offense, and one count of conspiracy. *See id.*

23. *Id.*

24. *See id.*

25. Degren v. State, No. 1135, slip op. (Md. Ct. Spec. App. Feb. 25, 1998).

26. *See Degren*, 352 Md. at 404, 722 A.2d at 889.

27. *See id.* at 404-05, 722 A.2d at 889.

28. *See id.* at 405, 722 A.2d at 889.

29. *See, e.g.*, Palmer v. State, 223 Md. 341, 353, 164 A.2d 467, 474 (1960) (concluding that a mother's failure to protect her child from the malicious attacks perpetrated by her boyfriend constituted "gross and criminal negligence" which contributed to the cause of her child's death).

30. *See* Act of April 30, 1963, ch. 743, 1963 Md. Laws 1536 (codified at MD. ANN. CODE art. 27, § 11A (Supp. 1962)). This statute, under the subtitle "Assault on Child," defined as

consistently expanded coverage of liability under this statute, have signaled the Legislature's intent to protect "children who have been the subject of abuse."[31] Additionally, Maryland case law prior to *Degren* has interpreted physical child abuse to include a caregiver's failure to act.[32] This legislation and case law reflects the trend of courts nationwide to extend "the scope of criminal liability for failure to act in those situations in which the common law or statutes impose a responsibility for the safety and well-being of others."[33]

a. Origins of a Parent's Legal Duty to Protect in Maryland: Palmer v. State.—Prior to the enactment of Maryland's child abuse statute in 1963, the Court of Appeals held, in *Palmer v. State*,[34] that because parents have a legal duty to their child, their failure to intervene on the child's behalf in cases of aggravated abuse resulting in

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a felony particular mistreatment of certain minor children by or in the presence of a specific class of persons, and provided the penalty therefore. *Id.* The statute provided:

> Any parent, adoptive parent or other person who has the permanent or temporary care or custody of a minor child under the age of fourteen years who maliciously beats, strikes, or otherwise mistreats such minor child to such degree as to require medical treatment for such child shall be guilty of a felony, and upon conviction, shall be sentenced to not more than fifteen years in the Penitentiary.

Id.

31. *Degren*, 352 Md. at 419, 722 A.2d at 896 (internal quotation marks omitted) (quoting State v. Fabritz, 276 Md. 416, 423, 348 A.2d 275, 279 (1975) (quoting Act of May 24, 1973, ch. 835, 1973 Md. Laws. 1708)).

32. *See Fabritz*, 276 Md. at 426, 348 A.2d at 281 (concluding that the caretaker's failure to act to provide treatment to an injured child was "cruel and inhumane" within the meaning of the statute as the terms are commonly understood); *see also* Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979) (restricting the class of persons covered by the child abuse statute, while reaffirming the principle established in *Fabritz*); Nancy A. Tanck, Note, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children from Abuse*, 1987 WIS. L. REV. 659, 666-70 (discussing the Maryland cases holding parents and caregivers criminally responsible for their child abuse).

33. State v. Walden, 293 S.E.2d 780, 785 (N.C. 1982); *see, e.g.*, State v. Miranda, 715 A.2d 680, 690 (Conn. 1998) (concluding that the defendant, the mother's live-in boyfriend, had a duty to protect the minor child, and the failure to do so was in violation of the state's assault statute); State v. Williquette, 385 N.W.2d 145, 155 (Wis. 1986) (concluding that defendant's conduct in continuing to leave her children in the care of their father, in spite of her knowledge that he was both physically and sexually abusing them, and her failure to protect them from such abuse, fell within the prohibitions of the child abuse statute); *Walden*, 293 S.E.2d at 787 (holding that "the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed"); State v. Ainsworth, 426 S.E.2d 410, 415 (N.C. Ct. App. 1993) (affirming the lower court's conviction for first degree rape on a theory of aiding and abetting where the defendant failed to take all reasonable steps necessary to prevent the rape of her son while in her presence).

34. 223 Md. 341, 164 A.2d 467 (1968).

death constituted a crime.[35] In *Palmer*, the court affirmed the conviction of the defendant, Barbara Ann Palmer, a teenage mother, for the involuntary manslaughter of her twenty-month-old child.[36] Although the defendant's boyfriend, Edward McCue, struck the deadly blow, the court emphasized the opportunity Ms. Palmer had had to remove "this poor little defenseless urchin . . . [from] an environment where she was subjected to merciless, inhumane . . . brutality."[37]

The court held that the child's mother had a legal duty to provide for the "support, care, . . . [and] welfare" of her child.[38] Although there was no evidence that Ms. Palmer ever abused the child herself,[39] the court concluded that the failure to protect her child from the brutality of her boyfriend's "outrageous" and appalling conduct, often occurring while in her presence, constituted a "wanton or reckless disregard for human life," and supported the trial judge's conclusion of "gross and criminal negligence" on the part of Ms. Palmer.[40]

Moreover, the court held that Ms. Palmer's negligence was the proximate cause of her child's death.[41] Although acknowledging Mr. McCue's indisputable role in the child's death, the court noted that "[t]o constitute the cause of the harm, it is not necessary that the defendant's act be the sole reason for the realization of the harm which has been sustained by the victim."[42] The court concluded that Mr. McCue's violent behavior was such that a reasonable person could foresee that the child's life was in danger.[43] Thus, Ms. Palmer's failure to protect her child from her ultimate fate was deemed by the court to be a "contributing cause of [the child's] unfortunate death."[44] The court explained that under Maryland law, one is guilty of involuntary manslaughter if the defendant owes someone a legal duty, fails to per-

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35. *Id.* at 353, 164 A.2d at 474.

36. *Id.* at 352-53, 164 A.2d at 473-74.

37. *Id.* at 351-52, 164 A.2d at 473.

38. *Id.* at 343, 164 A.2d at 468 (citing MD. ANN. CODE art. 72A, § 1 (1957)). Article 72A, § 1, read in relevant part: "The father and mother . . . [of a minor child] are jointly and severally responsible with its support, care, nurture, welfare and education." MD. ANN. CODE art. 72A, § 1, repealed by Act effective October 1, 1984, ch. 296, § 1, 1984 Md. Laws 1847-52; *see also* MD. CODE ANN., FAM. LAW § 5-203(b)(1) (Supp. 1998) (containing language similar to that found in the repealed statute).

39. *See Palmer*, 223 Md. at 350, 164 A.2d at 472.

40. *Id.* at 352, 164 A.2d at 473 (internal quotation marks omitted).

41. *See id.* at 352-53, 164 A.2d at 474 (upholding the trial court's conclusion that there was a "causal connection between the mother's negligence and the death").

42. *Id.* at 353, 164 A.2d at 474 (internal quotation marks omitted) (quoting 1 WHARTON, CRIMINAL LAW AND PROCEDURE § 68 (12th ed. 1957)).

43. *Id.*

44. *Id.*

form this duty, nonperformance results in that person's death, and the defendant's failure to act constituted gross and wanton negligence.[45]

As there was no child abuse statute in existence at the time of Ms. Palmer's conviction, the court's affirmation of Ms. Palmer's conviction under a theory of negligent homicide sent a clear message that under certain circumstances, criminal liability would extend to those parents who fail to perform the legal duty owed to their child.

b. Historical Perspective of Maryland's Statutory Scope of Criminal Liability for Child Abuse—a Continuous Expansion.—In response to *Palmer*, and amid an emerging consciousness of a tragic and escalating phenomenon known as the "Battered Child Syndrome,"[46] Maryland's General Assembly enacted a statute in 1963 to address the increasingly pervasive issue of child abuse.[47] Under this statute, it became a felony for any parent or certain other supervising adult of a minor child under the age of 14 years to "maliciously beat[ ], strike[ ], or otherwise mistreat[ ]" a child to the degree that the child would "require medical treatment."[48] This statute was subsequently amended in 1964[49] and in 1966,[50] both of which significantly augmented the origi-

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45. *Id.* at 343, 164 A.2d at 468-69; *cf.* Craig v. State, 220 Md. 590, 598, 155 A.2d 684, 689 (1959) (concluding that under the particular circumstances, the parents' failure to obtain medical attention for their dying child did not constitute a "wanton or reckless disregard for" the child's life and was therefore not the proximate cause of their child's death).

46. *See* Bowers v. State, 283 Md. 115, 118, 389 A.2d 341, 343 (1978) (referencing a clinical study conducted by a team of pediatricians headed by Dr. Henry C. Kempe, who first described the Battered Child Syndrome in 1962); *see also* James v. State 5 Md. App. 647, 650, 248 A.2d 910, 912 (1969) (recognizing the "Battered Child" syndrome as a term of art used by the medical profession and enumerating several of the "indices of suspicion" used by physicians to diagnose this syndrome). The court in *James* explained "Battered Child" as a

> clinical condition in infants who have received serious physical abuse; and that among the indices of suspicion which are designed to aid an examining physician in diagnosing a "battered child," . . . are (1) age usually under three years; (2) characteristic distribution of fractures; (3) disproportionate amount of soft tissue injury; (4) evidence that injuries occurred at different times and are in different stages of repair; (5) cause of recent trauma doubtful; (6) suspicious family history, and (7) previous similar episodes.

47. *See supra* note 30 (discussing the 1963 child abuse statute); *see also Bowers*, 283 Md. at 118, 389 A.2d at 274 (noting that "Maryland's initial attempt at achieving . . . reform in [the area of child abuse] came in 1963 with the enactment of Chapter 743 of the Laws of 1963, then codified as § 11A of Article 27").

48. Act of April 30, 1953, ch. 743, 1963 Md. Laws 1536, 1536.

49. *See* Act of April 7, 1964, ch. 103, 1964 Md. Laws 300, 300 (codified at MD. CODE ANN. art. 27, § 11A (Supp. 1964) (expanding the child abuse statute to require "physicians to report evidence of mistreatment of children to the Maryland State Police or Police Department of the County or City and relieving liability from such reporting").

nal statute. It was not until 1973, however, that the Legislature sought to expand the narrow scope of criminal liability provided for in the original statute.[51] The legislative purpose of this amendment was "the protection of children who have been the subject of abuse."[52] The amendment extended the scope of the original statute's protection of children from under fourteen years of age to under eighteen years of age, and provided for the punishment of any parent or other supervising adult who "causes abuse" to such children.[53] The amendment also repealed the "maliciously beats, strikes or otherwise mistreats"[54] standard for child abuse, and replaced it with a new, broader, two-pronged measure of "abuse" that required "[t]he sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act."[55]

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50. *See* Act of April 29, 1966, ch. 221, 1966 Md. Laws 466 (codified at MD. ANN. CODE art. 27, § 11A (1967)). This legislation significantly expanded the child abuse statute to

> increase the age of children the malicious mistreating of whom becomes a felony, providing more comprehensive requirements for reporting said malicious conduct to law enforcement officers, defining terms, requiring reports, investigations and making other general provisions to facilitate compliance with and enforcement of this law regarding the assaulting of children within the state.

Id. at 466.

51. *See* Act of May 24, 1973, ch. 835, Md. Laws 1708, 1709 (codified at MD. ANN. CODE art. 27, § 35A (Supp. 1973)) (defining "[a]buse" to include a two-pronged test that consists of injuries sustained as a result of (1) "cruel or inhumane treatment" or (2) "[a] malicious act or acts"). The statute's purpose was to

> provide certain definitions in the child abuse law and to mandate the reporting of suspected child abuse to certain agencies, and providing for cooperative efforts by certain agencies in cases of child abuse, and extending immunity to persons who report child abuse cases in good faith, and generally clarifying and extending the law relating to child abuse.

Id. at 1708.

52. *Id.* The amendment stated:

> The General Assembly hereby declares as its legislative intent and purpose the protection of children who have been the subject of abuse by mandating the reporting of suspected abuse, by extending immunity to those who report in good faith, by requiring prompt investigations of such reports and by causing immediate cooperative efforts by the responsible agencies on behalf of such children.

53. *Id.* at 1709. In relevant part, the statute reads:

> Any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for the supervision of a minor child under the age of eighteen years who *causes abuse* to such minor child shall be guilty of a felony and upon conviction shall be sentenced to not more than fifteen years in the penitentiary.

Id. (emphasis added).

54. *Id.*

55. *Id.* at 1709-10 (stating that "'[a]buse' shall mean any [nonaccidental] physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts by any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child").

In 1974, the Legislature further expanded the definition of "abuse" by prohibiting the sexual abuse of a child, "whether physical injuries are sustained or not."[56] The purpose of this amendment was to "expand[ ] the definition of child abuse, [and] defin[e] sexual abuse."[57] The amendment defined sexual abuse as "any act or acts involving sexual molestation or exploitation" by a parent or other supervising adult.[58] The statute further elaborated on the definition of sexual abuse by identifying several examples of sexual abuse, which included "incest, rape, carnal knowledge, sodomy or unnatural or perverted sexual practices."[59] The examples identified, however, were not intended to be exclusive examples of abuse.[60]

c. State v. Fabritz: *Extending Criminal Liability for Failure to Act in Cases of Physical Abuse.*—In 1975, in the seminal case of *State v. Fabritz*,[61] the Court of Appeals was faced with the task of interpreting the recently amended child abuse statute.[62] The issue before the court was whether, to be found guilty of felony child abuse, the defendant, Virginia Fabritz, should be required to have directly inflicted the physical injuries upon her child, rather than having aggravated them by failing to seek timely medical assistance.[63] Based on the Legislature's 1973 amendment to its original child abuse statute,[64] Chief Judge Murphy, writing for the court, broadly interpreted the statutory definition of "abuse."[65]

On October 1, 1973, Virginia Fabritz left her three-year-old daughter, Windy, in the care of two acquaintances, Tommy and Ann

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56. Act of April 30, 1974, ch. 554, 1974 Md. Laws 1887, 1889 (codified at MD. ANN. CODE art. 27, § 35A (Supp. 1974)).

57. *Id.* at 1887.

58. *Id.* at 1889.

59. 1974 Md. Laws at 1889 (codified at MD. ANN. CODE art. 27, § 35A(b)(8) (Supp. 1974)). In 1977, the Legislature replaced the phrase "carnal knowledge" with "sexual offense in any degree." Act of May 17, 1977, ch. 290, 1977 Md. Laws 1976, 1978.

60. *See* 1974 Md. Laws at 1889.

61. 276 Md. 416, 348 A.2d 275 (1975).

62. *Id.* at 422, 348 A.2d at 279 (applying principles of construction of statutes, the Court "consider[ed] the provisions of § 35A as they stood at the time of the alleged offense"); *see* Act of May 24, 1973, ch. 835 Md. Laws 1708, 1709 (codified at MD. ANN. CODE art. 27, § 35A (Supp. 1973)) (replacing the more limiting "maliciously beats, strikes or otherwise mistreats" test of the original 1963 statute with a two-pronged test that defined "[a]buse" as "physical injury or injuries sustained by a child as a result or cruel or inhumane treatment or as a result of malicious act or acts").

63. *See id.* at 420, 348 A.2d at 277-78.

64. *See supra* note 62 and accompanying text (discussing the expanded definition of child abuse).

65. *Fabritz*, 276 Md. at 423-24, 348 A.2d at 280.

Crockett.[66] Upon her return two days later, Ms. Fabritz discovered that during her absence her daughter had been severely beaten by Mr. Crockett.[67] Because she was "too ashamed of the bruises on her daughter's body," Ms. Fabritz put Windy to bed instead of immediately taking her daughter to the hospital.[68] As the evening progressed, Windy's condition deteriorated until she was finally taken to the hospital, where she was subsequently pronounced dead.[69] Earlier in the evening, Ms. Fabritz acknowledged to a friend that she had known that Mr. Crockett had struck her daughter.[70]

A jury in the Circuit Court for Calvert County convicted Ms. Fabritz under the child abuse statute.[71] Expert testimony presented at trial indicated that Windy would have lived had an operation been performed "within at least twelve hours prior to death; and that she would have had a chance to survive if surgery had been performed up to an hour before death."[72]

The Court of Special Appeals, however, reversed the judgment of conviction, holding that "to be guilty under the statute, the accused must be shown to have caused the injury, not simply aggravated it by failure to seek assistance."[73] The Court of Appeals granted certiorari to review the Court of Special Appeals's interpretation of the child abuse statute.[74]

The basis of the appeal was whether Windy's physical injuries suffered as a result of the defendant's failure to obtain medical assistance constituted "cruel or inhumane treatment," thereby falling within the scope of the statute.[75] The court first looked to the legislative purpose of the statute as embodied in section 35A and noted that it was the goal of the statute to "protect[ ] . . . children who have been the subject of abuse."[76] The court then compared the language used to define abuse in section 11A, with that of the replacement language used

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66. *See id.* at 418, 358 A.2d at 277.

67. *See id.* at 418, 348 A.2d at 276-77. It was revealed at trial that Windy had approximately seventy bruises or contusions covering her body, ranging in size from one inch to five inches. *See id.*, 348 A.2d at 276.

68. *Id.*, 348 A.2d at 277.

69. *See id.* at 419, 348 A.2d at 277.

70. *See id.*

71. *See id.* at 420, 348 A.2d at 277.

72. *Id.* at 419, 348 A.2d at 277.

73. Fabritz v. State, 24 Md. App. 708, 714, 332 A.2d 324, 327 (1975).

74. *Fabritz*, 276 Md. at 420, 348 A.2d at 278.

75. *Id.* at 425, 348 A.2d at 280.

76. *Id.* at 423, 348 A.2d at 279 (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 35A (Supp. 1973)).

to define abuse in section 35A.[77] It noted that the terms "maliciously beats, strikes or otherwise mistreats . . . [a] minor child to such degree as to require medical treatment" as used in section 11A, narrowly limited criminal liability to those who, "in one form or another, . . . assault[ed] a minor child."[78] However, the subsequent replacement of those terms with the language used in section 35A(b)(7), defining abuse as encompassing "any physical injury sustained by a child as a result of cruel or inhumane treatment or as a result of a malicious act," signaled to the court the intention of the Legislature to broaden the scope of the statute's prohibitions.[79]

The court concluded that by the Legislature's repeal of the more limiting language of section 11A, and the replacement of it with more encompassing terms, the Legislature sought to include an act of omission as constituting "cruel or inhumane treatment."[80] Thus, the court determined that an offense to the statute was committed if "physical injury to the child resulted *either* from a course of conduct constituting 'cruel or inhumane treatment' or by 'malicious act or acts.'"[81] The court bolstered its determination by applying a dictionary definition to the terms "physical injury" and "cause."[82] The court found that Virginia's failure to seek medical assistance for her daughter "caused" her child to suffer additional "physical injury" as a result of her deteriorating condition and was "cruel and inhumane treatment" as contemplated within the meaning of the statutory language as ordinarily understood.[83] Therefore, the Court of Appeals reversed the decision of the Court of Special Appeals.[84]

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77. *Id.*

78. *Id.* (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 35A (1971)) ("It would appear from its terms that the enactment was *not* intended to reach acts of individuals *not* constituting, in one form or another, an assault on a child.").

79. *Id.* at 423-24, 348 A.2d at 280 (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 35A(b)(7) (1971 & Supp. 1975)).

80. *See id.* (quoting MD. ANN. CODE art. 27, § 35A(b)(7) (Supp. 1973).

81. *Id.* at 424, 348 A.2d at 280 (emphasis added).

82. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1164 (1961) as defining injury as "an act that damages, harms or hurts . . ."; and cause as the "condition that brings about an effect or that produces or calls forth a resultant action or state" (internal quotation marks omitted)).

83. *Id.* at 425-26, 348 A.2d at 281.

84. *Id.* at 426, 348 A.2d at 281. Ms. Fabritz's conviction was subsequently vacated on habeas corpus in *Fabritz v. Traurig*, 583 F.2d 697 (4th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979). The Court of Appeals for the Fourth Circuit held that the child abuse statute was unconstitutional as applied to Ms. Fabritz because of insufficient evidence. *Id.* at 698. Nevertheless, it accepted the statute and the court's interpretation in *Fabritz* as valid. *Id.* at 700 (noting that the Court "accept[s] the statute [MD. ANN. CODE art. 27, § 35A (Supp. 1973)] as valid" as well as the Court of Appeals' "clear exposition of the critical words of the law").

In his dissent, Judge O'Donnell contended that the 1973 revisions of the provisions of section 35A(b)(7) were not intended by the Legislature to supersede the common law of manslaughter.[85] Rather, the child abuse statute filled a gap and was intended to punish acts that fell outside the ambit of common law assault, but short of manslaughter.[86] Hence, its purpose was to forbid "cruel and inhumane treatment" or "malicious act or acts" which resulted in "physical injury or injuries" to a child, not death.[87]

Judge O'Donnell noted that, as recognized in *Palmer*,[88] the "unintentional killing of another by the omission, through gross negligence, to perform a legal duty owing to him, was involuntary manslaughter at common law."[89] Consequently, if it was shown that Virginia Fabritz, by "gross or criminal negligence," acted with a "wanton or reckless disregard for human life" in failing to provide timely medical assistance for her daughter, according to Judge O'Donnell, she would have been subject to prosecution for common law involuntary manslaughter in the event of the child's death.[90]

Therefore, although Judge O'Donnell concurred with the majority that an offense under the statute is committed "if physical injury to the child resulted either, from a *course of conduct* constituting 'cruel and inhumane treatment,' or by 'malicious act or acts,'"[91] he took issue with the majority's application of the statute to the facts of the case.[92] He did not agree that the defendant's failure to seek medical assistance over a period of nearly eight hours was a "course of conduct" that constituted "cruel or inhumane treatment."[93] He pointed out that the relationship of the terms "cruel and inhumane" with the

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85. *Fabritz*, 276 Md. at 433, 348 A.2d at 284-85 (O'Donnell, J., dissenting).

86. *See id.* at 433, 348 A.2d at 285 (arguing that the statute sought to "proscribe 'cruel and inhumane treatment' or 'malicious act or acts' which directly result in 'physical injury or injuries,'" not death (internal quotation marks omitted)).

87. *Id.*

88. Palmer v. State, 223 Md. 34, 164 A.2d 467 (1960) (concluding that a parent's legal duty to their child made their failure to intervene on the child's behalf in cases of aggravated abuse that resulted in death, a crime).

89. *Fabritz*, 276 Md. at 427, 348 A.2d at 281 (O'Donnell, J. dissenting) (citations omitted); *see also* Craig v. State, 220 Md. 590, 596, 155 A.2d 684, 688 (1959) ("[I]t is almost universally recognized that where the defendant owed to a deceased person a specific legal duty, but failed to perform the same, and death resulted to the deceased because of the non-performance of the duty, (at least under circumstances where the failure to perform constituted gross and wanton negligence) the defendant is guilty of involuntary manslaughter.").

90. *Fabritz*, 276 Md. at 429, 348 A.2d at 283 (O'Donnell, J., dissenting).

91. *Id.* at 433-34, 348 A.2d at 285.

92. *Id.*

93. *Id.* at 434, 348 A.2d at 285.

words "malicious act or acts" requires an element of intent to cause the child to suffer physical injury.[94] He argued that although Ms. Fabritz may have used poor, or even negligent, judgment in her decision not to bring her child to the hospital, there was no proof of malice in her decision.[95]

d. Pope v. State: *Restricting the Duty to Protect a Child from Abuse.*—While the court in *Fabritz* interpreted the scope of the child abuse statute to include acts of omission as well as affirmative acts, it left unanswered the class of persons to whom the child abuse law applied.[96] This question was addressed three years later in *Pope v. State.*[97]

In *Pope,* the Court of Appeals reversed the conviction of the defendant, Joyce Pope, who did not intervene when her friend, Melissa Norris, beat her own child to death while a guest in the defendant's home and while in the defendant's presence.[98] The court acknowledged that Pope's "course of conduct" in failing to protect the child from numerous acts of abuse by her mother, and her failure to seek medical assistance for the child over a relatively protracted period of time, would fall within the ambit of the child abuse statute as applied in *Fabritz.*[99] Nevertheless, the court found that Ms. Pope's relationship to the victim did not place her within the class of persons covered by the statute, thereby placing her conduct beyond the reach of the law.[100]

Notwithstanding a moral duty, Maryland law does not recognize a legal duty on the part of a person to come to the aid of another in peril, whether that person is a stranger, adult, or child.[101] Failure to render aid, however, is not a complete defense for a person who falls within the common law exceptions based upon a special relationship

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94. *Id.*

95. *Id.* (arguing that the mother's failure to "promptly obtain medical assistance imputed to her any intent to permit the child to continue to suffer or die").

96. *See* Pope v. State, 284 Md. 309, 320, 396 A.2d 1054, 1062 (1979) (noting that "*Fabritz* did not go to the class of persons to whom the statutory proscription [of child abuse] applies"). The class of persons to whom the statute applied was left unanswered as the defendant in *Fabritz* was the victim's parent, a class specifically designated in the statute. *See Fabritz,* 276 Md. at 425-26, 348 A.2d at 280-81.

97. 284 Md. 309, 396 A.2d 1054 (1979).

98. *Id.* at 312-13, 396 A.2d at 1057-58.

99. *Id.* at 328, 396 A.2d at 1066.

100. *Id.* at 330, 396 at 1067.

101. *Id.* at 324, 396 at 1064; *see also* W. LAFAVE & A. SCOTT, CRIMINAL LAW 183 (1972) (arguing that "[g]enerally one has no legal duty to aid another person in peril, even when that aid can be rendered without danger or inconvenience to himself" and that "[a] moral duty to take affirmative action is not enough to impose a legal duty to do so").

between the parties or one who is excepted by statutory provision,[102] such as those provided for in Maryland's child abuse statute.[103]

In *Pope*, the applicable provision of the statute pertained to "any parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for supervision of a minor child."[104] As Ms. Pope was not the parent, adoptive parent, or a person who had "permanent or temporary care or custody" of the minor child, the issue presented was whether Joyce Pope was a person deemed to have "responsibility for the supervision of the minor child" as a result of the mother and child being guests in her home.[105] After reviewing the legislative history and the plain meaning of the statute, the court concluded that

> [a]bsent a court order or award by some appropriate proceeding pursuant to statutory authority, . . . responsibility for supervision of a minor child may be obtained only upon the mutual consent, expressed or implied, by the one legally charged with the care of the child and by the one assuming the responsibility.[106]

The court found no evidence that Ms. Pope had so assumed responsibility for the child, and thus her conviction was overturned.[107]

Judge Eldridge, concurring in part and dissenting in part, disagreed with the restrictive interpretation by the majority in that "only those persons who have been *granted* responsibility by a parent or guardian" should fall within the statute's scope.[108] He contended that

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102. *See* Adams, *supra* note 8, at 524 (surveying judicial bases for holding parents criminally liable); Jean Peters-Baker, *Punishing the Passive Parent: Ending a Cycle of Violence*, 65 UMKC L. REV. 1003, 1010 (1997) (arguing that a parent has a legal duty to render aid to their own child). Adams notes:

> Courts have held condoning parents criminally liable through a combination of several doctrinal approaches: (1) holding that a parent has a legal duty to protect her child; (2) holding condoning parents to a reasonable person standard; (3) liberally interpreting existing child abuse statutes to include condoning parents; (4) broadly construing the notion of proximate cause to include failure to seek medical attention for one's child; and (5) construing child abuse as a general intent crime. In addition, legislatures in several states have enacted statutes that specifically criminalize the failure to protect a child from abuse.

103. *See* MD. ANN. CODE art. 27, § 35(c) (Supp. 1998) (applying criminal liability for child abuse, both physical and sexual, to any "parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member").

104. MD. ANN. CODE art. 27, § 35A (b)(7) (Supp. 1979); *see also Pope*, 284 Md. at 317, 396 A.2d at 1060.

105. *Pope*, 284 Md. at 329, 396 A.2d at 1066.

106. *Id.* at 323, 396 A.2d at 1063.

107. *Id.* at 330, 396 A.2d at 1067.

108. *Id.* at 356, 396 A.2d at 1080 (Eldridge, J., concurring in part and dissenting in part).

a person should be held liable if he or she abuses a child whether or not they assume responsibility for a child with or without the parent's consent.[109]

e. Persuasive Authority in Foreign Jurisdictions.—Extending criminal liability to the condoning caregiver has not been limited to Maryland courts. While other jurisdictions may utilize different approaches to attach criminal liability to a condoning caregiver, the results are the same.[110] It has been the "trend of Anglo-American law" to "enlarg[e] the scope of criminal liability for failure to act in those situations in which the common law or statutes impose a responsibility for the safety and well-being of others."[111]

For example, in *State v. Walden*, the Supreme Court of North Carolina extended criminal liability to a passive parent based on a parent's legal duty to protect its child.[112] *Walden* involved a physical assault on defendant Aleen Walden's one-year-old son.[113] Although Ms. Walden did not inflict the injuries herself, she was present when the beatings took place and failed to intervene on her child's behalf.[114] Ms. Walden was prosecuted and convicted under the theory that she aided and abetted a friend, the perpetrator of the abuse, in the commission of the assault on her child, and was thereby guilty as a principal to the offense charged.[115] Predicated on the notion that it is an inherent duty of parents to provide for the safety of their children, the court affirmed the conviction, concluding that a parent's failure to take all of the "steps reasonably possible" to prevent harm to its child "constitutes an act of omission by the parent showing the parent's consent and contribution to the crime."[116]

Similarly, in *State v. Williquette*,[117] relying in part on Maryland case law,[118] the Wisconsin Supreme Court broadened the scope of their

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109. *Id.* (noting that there is "no public policy" justification for not holding accountable a person who assumes responsibility for a child without the parent's consent).

110. *See* Adams, *supra* note 8, at 524 (asserting that although "Courts have held condoning parents criminally liable through a combination of several doctrinal approaches," that parents who condone the abuse of their children "could potentially be reached by all of these . . . approaches").

111. State v. Walden, 293 S.E.2d 780, 785 (N.C. 1982).

112. *Id.* at 786.

113. *Id.* at 782.

114. *See id.* at 782-83.

115. *See id.* at 783.

116. *Id.* at 787.

117. 385 N.W.2d 145 (Wis. 1986).

118. The court discussed *State v. Fabritz*, 276 Md. 416, 348 A.2d 275 (1975), *Pope v. State*, 284 Md. 309, 396 A.2d 1054 (1979), *Palmer v. State*, 223 Md. 341, 164 A.2d 467 (1960), and the principles established therein. *Id.* at 153-54.

child abuse statute to reach a condoning parent through a liberal interpretation of that statute.[119] Petitioner, Terri Williquette, was charged under the Wisconsin child abuse statute for failing to prevent her husband from repeatedly "sexually abusing, beating, and otherwise mistreating" her seven-year-old son and eight-year-old daughter.[120] Although Ms. Williquette was not present during the abuse, both children had gone to her with complaints of the abuse.[121] In spite of this knowledge, she regularly left them in her husband's care.[122]

As in *Fabritz*, the *Williquette* court was required to determine if the statute's language included acts of omission.[123] The court gave particular scrutiny to the statutory phrase "subjects a child to cruel maltreatment."[124] Determining that the plain meaning of the terms does not limit application to direct acts of commission, the court concluded that the statute reached a person who has a duty to the child, and exposes the child to foreseeable abuse.[125] Moreover, the court stated that there is no criminal intent requirement for liability to attach.[126] The court reasoned that its interpretation was correct because of the purpose of the statute, which is to "protect children from the consequences of conduct" that is "abhorrent to the sensitivities of the general public."[127]

In the recently decided case of *State v. Miranda*,[128] the Connecticut Supreme Court determined that the live-in boyfriend of an abusive mother had established a familial relationship with the victims' mother and her children such as to assume responsibility for the welfare of the children, as though "he were their father."[129] Accordingly, the boyfriend incurred a legal duty to protect the child from the abuse of her mother, the breach of such duty constituting criminal

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119. *Id.* at 154.

120. *Id.* at 147 (internal quotation marks omitted) (citation omitted).

121. *See id.* at 150.

122. *See id.*

123. *See id.* at 149; *see also supra* note 80 and accompanying text.

124. *Williquette*, 385 N.W.2d at 149 (internal quotation marks omitted) (quoting WIS. STAT. § 940.201 (1985-1986)).

125. *See id.* at 150.

126. *Id.*; *see also* State v. Danforth, 385 N.W.2d 125, 126 (Wis. 1986) (concluding that child abuse does not require that a person have criminal intent to cruelly maltreat a child); State v. Killory, 243 N.W.2d 475, 480 (Wis. 1976) (stating that child abuse does not require malice).

127. *Williquette*, 385 N.W.2d at 150 (internal quotation marks omitted) (quoting State v. Killory, 243 N.W.2d 475, 480 (Wis. 1976)).

128. 715 A.2d 680 (Conn. 1998).

129. *Id.* at 682.

liability under the general assault statute.[130] As in *Walden*, the court in *Miranda* acknowledged that criminal conduct could arise not only through affirmative acts, but also by an omission to act when there is a legal duty to do so and the failure to act results in an injury.[131] Because, according to the court, the defendant had established a familial relationship, he assumed under common law "the same legal duty to protect the victim from the abuse as if he were, in fact, the victim's guardian."[132]

Finally, North Carolina has demonstrated a willingness to extend liability to caregivers for failure to act in cases involving sexual abuse. In *State v. Ainsworth*,[133] the issue was whether the defendant, Deborah Ainsworth, was guilty of aiding and abetting in the first degree rape of her twelve year old son, when he was engaged in sexual intercourse with an adult female in the defendant's presence and the defendant failed to take all "reasonable steps possible" to prevent the intercourse.[134] The Court of Appeals of North Carolina affirmed the defendant's conviction relying on the *Walden* decision in which a parent's failure to take all "steps reasonably possible" to prevent *physical* harm to their child constituted an act of omission by the parent showing the parent's "consent and contribution to the crime."[135]

Drawing parallels to the circumstances found in *Walden*, the court noted that Ms. Ainsworth was laying in the same bed as her twelve year old child who was being raped "without uttering a single word in his defense," in spite of their being no risk of danger for her to do so.[136] The court concluded that the defendant's failure to prevent her son's rape "clearly f[ell] within the *Walden* holding."[137] Furthermore, the court acknowledged that the harm caused to the victim by the rape was "no less severe" than the physical injuries sustained by the child in *Walden*, citing the "reality . . . of sexually transmitted diseases and emotional damage resulting from sexual abuse . . . which could have severe psychological repercussions requiring long term treatment."[138]

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130. *See id.*

131. *See id.* at 686; *see also supra* note 116 and accompanying text.

132. *Miranda*, 715 A.2d at 689.

133. 426 S.E.2d 410 (N.C. Ct. App. 1993).

134. *Id.* at 415.

135. *Id.* (internal quotation marks omitted) (quoting State v. Walden, 293 S.E.2d 780, 787 (N.C. 1982)).

136. *Id.* (noting that in *Walden*, evidence was presented that although the mother was present when her child was being beaten with a belt, she "looked on, but did not say or do anything to stop the beating").

137. *See id.*

138. *Id.* at 416.

3. The Court's Reasoning.—In *Degren*, the Court of Appeals held that the definition of sexual abuse, as defined in section 35C(a)(6)(i) of the child abuse statute,[139] contemplates both an affirmative act of directly molesting or exploiting a minor child, and a caregiver's failure to prevent the molestation or exploitation of a child.[140] This holding was an extension of the prior holdings in *Fabritz* and *Pope*, in which the court interpreted section 35A of the child abuse statute to include acts of omission in cases of physical abuse.[141]

Relying on the same method of statutory interpretation as it did in *Fabritz*, the court sought to determine the Legislature's intent concerning the scope of statutory liability in cases of sexual abuse.[142] Utilizing the "cardinal rule" of statutory construction, the court looked at the plain meaning of the statute itself.[143] The court acknowledged that if statutory language is unambiguous, and "expresses a definite and simple meaning," courts customarily would not look beyond the words of the statute to determine the Legislature's intent.[144] The court noted, however, that although the statutory language is a legitimate indicator of the Legislature's intent, interpretation of the statute must also be construed reasonably with regard to the "purpose, aim, or policy of the enacting body."[145] Moreover, interpretation of a statute must comport with logic, reason, and common sense.[146]

Looking at the plain meaning of section 35C(a)(6)(i), the court explained that sexual abuse is defined as "any *act* that involves sexual molestation or exploitation of a child."[147] At issue was the definition

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139. *See* MD. ANN. CODE art. 27, § 35C(a)(6)(i) (1996).

140. *Degren*, 352 Md. at 425, 722 A.2d at 899.

141. *See id.* at 424-25, 722 A.2d at 899; *see also supra* notes 80 and 99.

142. *Degren*, 352 Md. at 417-18, 722 A.2d at 896; *see also* State v. Fabritz, 276 Md. 416, 421-22, 348 A.2d 275, 278-79; *supra* notes 76-80.

143. *Degren*, 352 Md. at 417-19, 722 A.2d at 895-96 ("As we often said, the starting point for determining legislative intent is the language of the statute itself.").

144. *Id.* at 417, 722 A.2d at 895 (citing Marriott Employees Fed. Credit Union v. Motor Vehicle Admin., 346 Md. 437, 446, 697 A.2d 455, 458 (1997); Kaczorowski v. Mayor of Baltimore, 309 Md. 505, 515, 525 A.2d 628, 633 (1987); Hunt v. Montgomery County, 248 Md. 403, 414, 237 A.2d 35, 41 (1968)).

145. *Id.* at 417, 722 A.2d at 895 (internal quotation marks omitted) (quoting Tracey v. Tracey, 328 Md. 380, 387, 614 A.2d 590, 594 (1992)).

146. *See id.* at 418, 722 A.2d at 895 (observing that a statute should be construed in a manner that provides for an interpretation that is "reasonable and consonant with logic and common sense" (internal quotation marks omitted) (quoting Lewis v. State, 348 Md. 648, 654, 705 A.2d 1128, 1131 (1998))).

147. *Id.* at 418, 722 A.2d at 896 (alternation in original) (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 35C(a)(6)(i) (1996)).

of the word "act."[148] As the term is not defined in the statute, the court examined dictionary definitions of the word.[149] Although the collegiate dictionary definition of the word "act" seemed to require an affirmative action,[150] the court noted that there were other interpretations of the word "act."[151] For instance, in *Black's Law Dictionary*, "act" in the context of a "criminal act" is defined as "[a]n omission or failure to act . . . for [the] purpose of criminal law."[152] The court then examined the word "act" in relation to the other terms of the provision. It noted that "act" is modified by the phrase "that *involves* sexual molestation or exploitation."[153] Noting that the dictionary definition of the term "involves" suggests a "broad sense of inclusion," the court concluded that the word "act" seems to "expand the scope of the word 'act' from just the deed of molestation or exploitation into something done by the accused that relates to the molestation or exploitation."[154] As the term "act" is capable of more than one reasonable interpretation, the court looked beyond the plain meaning of the statute to determine the Legislature's intent.[155]

Referencing the groundwork laid by the court in *Fabritz*, the court recognized the consistent expansion of the scope of liability and applicability of the child abuse statute through amendments to the original statute.[156] Particularly significant was the General Assembly's 1973 amendment that increased the age of protection from sixteen years to eighteen years, and repealed the restrictive language requiring overt acts of physical abuse, substituting in its place language that would encompass both an act or failure to act as being "cruel or inhumane treatment or a malicious act."[157]

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148. *Id.* at 418, 722 A.2d at 896.

149. *Id.* at 418-19, 722 A.2d at 896.

150. *See id.* at 418, 722 A.2d at 896; *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 11 (10th ed. 1998) (defining "act" as "the doing of a thing: DEED"; "something done voluntarily"; "the process of doing: ACTION.").

151. *See Degren*, 352 Md. at 418, 722 A.2d at 896.

152. *Id.* at 418-19, 722 A.2d at 896 (internal quotation marks omitted) (quoting BLACK'S LAW DICTIONARY 25 (6th ed. 1990); *see also* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW § 4, at 658 (3d ed. 1982) (stating that "[i]n a legislative enactment . . . if the phrase act or omission is found, the first word is being employed in the limited sense of act of commission; whereas if only the word 'act' is used, it is construed ordinarily to include also forbearance or omission" (footnotes omitted)).

153. *Degren*, 352 Md. at 419, 722 A.2d at 896 (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 35(a)(6)(i) (1996)).

154. *Id.*

155. *Id.*

156. *Id.* at 419-20, 722 A.2d at 896-97; *see also* discussion *supra* Part 3.b (discussing the enactment of Maryland's child abuse statute and its expansion through amendment).

157. *Id.*, 722 A.2d at 896; *see also supra* notes 52-55 and accompanying text (discussing the provisions of MD. ANN. CODE art. 27, § 35A (Supp. 1973)).

The court noted that in 1974, the Legislature further expanded the scope of the child abuse statute to include sexual abuse as within its definition of conduct that constituted abuse.[158] Specifically, according to the court, the amendment defined sexual abuse as any "act or acts involving sexual molestation or exploitation."[159] Such act or acts included, although were not limited to, "incest, rape, carnal knowledge, sodomy or unnatural or perverted sexual practices."[160] The class of persons liable under this provision of the statute was any "parent, adoptive parent or other person who has the permanent or temporary care or custody or responsibility for the supervision" of a child under the age of eighteen years.[161]

The crux of Sharon Degren's argument was based on the distinction between the statutory language used to define the conduct constituting *physical* abuse and the language used to define the conduct constituting *sexual* abuse.[162] In section 35C(a)(2), "Abuse" is defined:

> (i) The sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, under circumstances that indicate that the child's health or welfare is harmed or threatened thereby; or
> (ii) Sexual abuse of a child, whether physical injuries are sustained or not.[163]

In section 35C(a)(6) sexual abuse is further defined as

> (i) any act that involves sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member.
> (ii) "Sexual abuse" includes, but is not limited to:
> 1. Incest, rape, or sexual offense in any degree;
> 2. Sodomy; and

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158. *Id.* at 420, 722 A.2d at 896.

159. *Id.*; *see also* Act of April 30, 1974, ch. 554, 1974 Md. Laws 1887, 1889.

160. *Degren*, 352 Md. at 420, 722 A.2d at 896-97 (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 35A(b)(8) (Supp. 1974)); *see also* 1974 Md. Laws at 1889.

161. *Degren*, 352 Md. at 420, 722 A.2d at 896-97 (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 35A(a) (Supp. 1974)); *see also* 1974 Md. Laws at 1888.

162. *See Degren*, 352 Md. at 420-21, 722 A.2d at 897 (noting that "[i]mplicit in petitioner's argument is the notion that the Legislature failed to enact more encompassing language, such as that used in the 1973 amendment of the definition of physical abuse").

163. MD. ANN. CODE art. 27, § 35C (Supp. 1996).

3. Unnatural or perverted sexual practices.[164]

Degren argued that the scope of the definition of physical abuse was broader than that of sexual abuse, signaling the Legislature's "intent to limit what constitutes sexual abuse to affirmative deeds."[165] In her brief, she argued that whereas the two-pronged definition of physical abuse encompassed both "injury, producing affirmative conduct ("a malicious act") or injury-producing neglect ("cruel or inhumane treatment")" the narrow definition of sexual abuse utilized by the Legislature in its 1974 amendment demands that the term "act" be construed so as to require an overt act "involv[ing] sexual molestation or exploitation" of a child.[166] Thus, the petitioner argued that because there was no ambiguity in the meaning of the language defining sexual abuse, the lower courts erred in looking beyond the plain meaning of the statutory language.[167]

The court, however, discounted *Degren*'s argument as defying "common sense, logic, and the purpose and goals" of the statute and its subsequent amendments.[168] The court pointed out the absurdity of such an argument by illustrating the result that would ensue if the court accepted such an interpretation:

> Under [Mrs. Degren's] theory . . . if [she] had sat on the edge of the bed and watched Mr. Degren beat Jennifer, she could have been prosecuted under the statute for her failure to intervene. Because she sat on the bed and watched her husband rape Jennifer . . . [she] cannot be prosecuted for sexual abuse for failing to stop her husband because his actions were not physical abuse.[169]

The court noted that implicit in this line of reasoning would be the Legislature's belief that sexual abuse is somehow a less serious offense than physical abuse.[170] The court rejected this argument outright.[171] Citing the language in section 35C(a)(2)(ii), the court emphasized that the Legislature was well aware of the serious nature

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164. *Id.*

165. *Degren*, 352 Md. at 420, 722 A.2d at 897.

166. Brief of Petitioner at 8, 14, Degren v. State, 352 Md. 400, 722 A.2d 887 (1999) (No. 54).

167. *See id.* at 10.

168. *Degren*, 352 Md. at 420, 722 A.2d at 897.

169. *Id.* at 420-21, 722 A.2d at 897.

170. *Id.* at 421, 722 A.2d at 897 (observing that petitioner's argument that the Legislature's failure to enact more encompassing language as was used in the 1973 amendment implied that the Legislature "deemed sexual abuse a less serious offense than physical abuse").

171. *Id.*

of sexual abuse and consequently did not require that a victim sustain physical injuries for a defendant to be charged with sexual abuse.[172] This, the court reasoned, exhibited the Legislature's recognition of the "extensive emotional, psychological, or physical damage that sexual abuse can cause a child."[173] Given the Legislature's awareness, the court concluded that it was inconceivable that the Legislature would intend to punish failure to act in cases of physical abuse but not in cases of sexual abuse.[174]

In support of its conclusion, the court referred to the North Carolina case of *State v. Ainsworth*.[175] Recognizing the similarity of circumstances between the two cases, the court noted with approval the *Ainsworth* court's recognition of the gravity of sexual abuse when it declared "[w]e would be blind to both the cold reality of today's world of sexually transmitted diseases and emotional damage resulting from sexual abuse . . . the child here was exposed to an event which could have severe psychological repercussions."[176]

Sharon Degren further argued that the doctrine of ejusdem generis[177] supported the plain meaning interpretation of the term "act."[178] She noted that while sexual abuse is defined in section 35C(a)(6)(i), section 35C(a)(6)(ii) goes on to list several examples of sexual abuse, including "incest, rape, sexual offense in any degree, sodomy, and unnatural or perverted sexual practices."[179] Therefore, because incest, rape, sexual offense, and unnatural or perverted sexual practices are all acts of commission, it follows that the broader definition of sexual abuse is limited to acts of commission.[180]

The court, however, declined to apply the doctrine of ejusdem generis in construing this statute. The court noted:

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 422, 722 A.2d at 898; *see also supra* notes 133-138 and accompanying text (discussing the *Ainsworth* decision).

176. *Degren*, 352 Md. at 424, 722 A.2d at 899 (quoting State v. Ainsworth, 426 S.E.2d 410, 415 (N.C. App. 1993)).

177. The doctrine of ejusdem generis provides that "where general rules in a statute follow the designation of particular things or classes of subjects or persons, the general words will usually be construed to include only those things or persons of the same class or general nature as those specifically mentioned." *Id.* at 427, 722 A.2d at 900 (quoting Smith v. Higinbothom, 187 Md. 115, 130, 48 A.2d 754, 761-62 (1946)).

178. *See id.* at 426, 722 A.2d at 900.

179. *Id.* (citing Brief of Petitioner at 10, *Degren* (No. 54)).

180. *See* Brief of Petitioner at 11, *Degren* (No. 54) (arguing that the rule ejusdem generis requires that sexual abuse be confined to acts of commission as in keeping with the examples of sexual abuse as noted in MD. ANN. CODE § 35C(a)(6)(ii) (1996)).

> The doctrine of ejusdem generis applies when the following conditions exist: (1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires. It is generally held that the rule . . . is merely a rule of construction and is only applicable where legislative intent or language expressing that intent is unclear.[181]

However, the court distinguished the application of ejusdem generis under the circumstances in the present case, noting that the doctrine cannot be applied "to restrict the meaning of words within narrower limits than the statute intends, so as to subvert its obvious purpose."[182] The court stressed that the Legislature's use of the general phrase—"[s]exual abuse includes, but is not limited to"—preceding the list of examples, made it clear that the list is not comprehensive.[183] Additionally, taking into consideration the declared purpose of the child abuse statute, "to protect children subject to abuse," the court did not believe that the Legislature chose to limit the forms of sexual abuse to only those enumerated in section 35C(a)(6)(ii).[184] To do so, the court argued, would be to "subvert . . . [the statute's] obvious purpose."[185]

Finally, the court found that Sharon Degren was not only guilty of sexual abuse under the court's interpretation of that statute, but could also be found guilty of the offense of sexual abuse based on her own interpretation of the statute.[186] By her own admission, on at least one occasion, she was aware that Jennifer and her husband were having sexual intercourse and sat on the same bed and watched.[187] She acknowledged that on another occasion she witnessed Jennifer and

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181. *Degren*, 352 Md. at 427, 722 A.2d at 900 (quoting *In re Wallace W.*, 333 Md. at 190, 634 A.2d at 55-56 (quoting 2A SUTHERLAND STAT. CONST. § 47.18, at 200 (5th ed. 1992))).

182. *Id.* (internal quotation marks omitted) (quoting citing Blake v. State, 210 Md. 459, 462, 124 A.2d 273, 274 (1956)).

183. *Id.* at 428, 722 A.2d at 900 (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 35(a)(6)(ii) (Supp. 1996)).

184. *Id.* (internal quotation marks omitted) (quoting MD. ANN. CODE art. 27, § 35A (Supp. 1973)).

185. *Id.* (internal quotation marks omitted) (quoting *Blake*, 210 Md. at 462, 124 A.2d at 274).

186. *Id.* at 425-26, 722 A.2d at 899.

187. *See id.* at 426, 722 A.2d at 899.

Rick Dobsha engaged in sexual intercourse.[188] On both occasions, the court concluded that she was engaged in the affirmative act of watching her husband or Mr. Dobsha have intercourse with a minor child.[189] By watching the rapes and failing to intervene, the court reasoned that she had "participated in the molestation and exploitation of a minor by allowing sexual intercourse between Jennifer and the two men to occur."[190]

4. Analysis.—In *Degren*, the Court of Appeals held that an adult with responsibility for the supervision of a minor child may be guilty of an offense defined under section 35C(a)(6)(i) of the child abuse statute if she knowingly fails to protect the child from sexual molestation or exploitation at the hands of a third party.[191] This holding is consistent with the Maryland Legislature's declared purpose and with the language of the original child abuse statute, as well as with its expansion of coverage through subsequent amendments.[192] Moreover, this holding is a logical extension of prior case law and is consistent with the national trend toward protecting abused children. The court's decision also promotes a commendable public policy effort to protect our most vulnerable class of citizens.

a. Consistent with Legislative Intent.—It is well recognized that penal statutes must be strictly construed.[193] Therefore, courts will normally not extend culpability to cases "not plainly within the language used."[194] This was problematic for the *Degren* court as section 35C(a)(6)(i) contained no express language indicating the Legisla-

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188. *See id.*

189. *Id.*

190. *Id.* (citing Brackins v. State, 84 Md. App. 157, 162, 578 A.2d 300, 302 (1990)). In *Brackins*, the Court of Special Appeals noted:

> To be convicted of exploitation and, therefore, child abuse, threats, coercion, or subsequent use of the fruits of the acts are not necessary. The State need only prove, beyond a reasonable doubt, that the parent or person having temporary or permanent custody of a child took advantage of or unjustly or improperly used the child for his or her *own* benefit.

Brackins, 84 Md. App. at 162, 578 A.2d at 302.

191. *Degren*, 352 Md. at 424-25, 722 A.2d at 899.

192. *See supra* note 51 and accompanying text (discussing the Maryland child abuse statute and subsequent amendments).

193. *See, e.g.*, State v. Fabritz, 276 Md. 416, 422, 348 A.2d 275, 279 (1975) (recognizing that it is "well settled that penal statutes must be strictly construed" (citing State v. Fleming, 173 Md. 192, 195 (1937))).

194. *Id.* at 422, 348 A.2d at 279 (internal quotation marks omitted) (quoting State v. Archer, 73 Md. 44, 57, 20 A. 172, 172 (1890)).

ture's intent to include acts of omission within its scope.[195] Recognizing this oversight, the court acknowledged that the Legislature "did not utilize language as broad as . . . the 1973 amendment that expanded the type of conduct culpable as physical abuse to include an . . . omission to act" in the 1974 amendment that added "sexual abuse" to the definition of child abuse.[196] The court, however, properly refuted the argument that the failure to expressly reference omissions to act by the Legislature reflects its intent to limit what constitutes sexual abuse to affirmative deeds.

First, and perhaps most persuasive, was the court's common sense approach to interpreting the language of the statute. The court shrewdly illustrated its point by examining the implications of Ms. Degren's theory that the prohibition against sexual abuse in section 35C(a)(2)(ii) applied only to affirmative actions.[197] The court describes two different scenarios. First, Sharon Degren sits on the edge of her bed and watches her husband *beat* Jennifer.[198] In this case, she could clearly be prosecuted under the child abuse statute for her failure to intervene.[199] Second, Sharon Degren sits on the bed watching her husband *rape* Jennifer.[200] Under her interpretation of the statute, she cannot be prosecuted for sexual abuse for failing to protect the child because his actions did not constitute *physical abuse.*[201] The court correctly rejected this scenario as "absurd," and refused to believe this could possibly be the intent of the Legislature.[202]

Inherent in Sharon Degren's argument, as the court noted, is the belief that somehow the Legislature makes the distinction between physical abuse and sexual abuse because it deems sexual abuse to be a less serious offense.[203] In light of the scenarios like the ones presented above, such a notion is repugnant. Upon examining this line of reasoning, it is clear that Degren's underlying belief is that, unlike physical abuse, sexual abuse cases involving a minor child may involve more "gray areas" because "consensual sex" may be in-

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195. *See* MD. ANN. CODE art. 27, § 35C(a)(6)(i) (Supp. 1996) (defining sexual abuse as "any act that involves sexual molestation or exploitation of a child" by certain supervising adults).

196. *Degren*, 352 Md. at 420, 722 A.2d at 897.

197. *See id.* at 420-21, 722 A.2d at 897.

198. *See id.* at 420, 722 A.2d at 897.

199. *See id.* (applying the holding of *State v. Fabritz*, 276 Md. 416, 423-24, 348 A.2d 275, 280 (1975)).

200. *See id.* at 420-21, 722 A.2d at 897.

201. *See id.* (arguing the scope of the definition of physical abuse was broader than that of sexual abuse); *see also supra* notes 165-167 and accompanying text.

202. *Degren*, 352 Md. at 421, 722 A.2d at 897.

203. *See id.*; *see also* supra notes 165-167.

volved.[204] Sex between a twelve-year-old child and an adult male, however, can never be consensual.[205] Dismissing this argument, the *Degren* court properly noted "the victim was not of sufficient age to give consent to the sexual acts performed upon her."[206] Moreover, the court argued that evidence that the Legislature comprehends the serious repercussions of sexual abuse can be found in its willingness to allow prosecution for sexual abuse even when there is no evidence of physical injuries.[207]

The court also relied upon the Legislature's consistent expansion of the scope of the child abuse statute through subsequent amendments.[208] Referencing its reasoning in *Fabritz*, the court deemed that such consistent expansion of the scope of the statute was evidence of the Legislature's growing concern with the increasing incidence of child abuse, and comports with the declared purpose of the statute: protection of children.[209] The *Degren* court is correct in this assessment. Nowhere in the legislative history of the statute is there evidence that the Legislature attempted to restrict the scope of the statute.[210] In fact, following the broad interpretation of the physical abuse provision of the statute given by the *Fabritz* court, the Legislature further expanded the scope of the statute in their 1974 amend-

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204. *Degren*, 352 Md. at 421 n.10, 722 A.2d at 897 n.10 (noting that "the victim was not of sufficient age to give consent to the sexual acts performed upon her"); *see also* Stacey Winakur, *Reach of Child Sexual Abuse Law Before Maryland's Highest Court Woman Did not Stop Husband from Sexually Abusing Girl Staying With Them; Lawyer Argues Inaction Not Criminal*, DAILY RECORD, Dec. 9, 1998, at 1C ("[Assistant Public Defender John L. Kopolow, representing Sharon Degren,] said that . . . sometimes sexual abuse cases involve an underage teenager engaged in consensual sex . . . 'I think there are more gray areas' in sexual abuse cases, Kopolow said, which would explain why the legislature punishes failure to act in one case but not the other.").

205. *See* MD. ANN. CODE, art. 27, § 463(a)(3) (1996) (having sex with a person under 14 years of age is rape in the second degree regardless of consent).

206. *Degren*, 352 Md. at 421 n.10, 722 A.2d at 897 n.10.

207. *See id.* at 421, 722 A.2d at 897 ("By clarifying that sexual abuse need not necessarily lead to physical injuries in order to be prosecuted, the legislature recognized the extensive emotional, psychological or physical damage that sexual abuse can cause a child.").

208. *Id.* at 419-20, 722 A.2d at 896; *see supra* notes 41-60 (describing the Maryland child abuse statute and subsequent amendments).

209. *Id.*, 722 A.2d at 896-97; *see* Act of May 24, 1973, ch. 835, 1973 Md. Laws 1708, 1708 ("The General Assembly hereby declares as the legislative intent and purpose the protection of children . . . .").

210. *See supra* notes 46-60 and accompanying text (discussing the continued expansion of the original child abuse statute through subsequent amendments); *see also* 1964 Md. Laws 103; 1966 Md. Laws 221; 1967 Md. Laws 38; 1968 Md. Laws 702; 1970 Md. Laws 500; 1073 Md. Laws 656, 835; 1974 Md. Laws 372, 554; 1975 Md. Laws 219; 1977 Md. Laws 290, 504, 1979 Md. Laws 365; 1980 Md. Laws 712; 1981 Md. Laws 770; 1984 Md. Laws 296; 1990 Md. Laws 604; 1991 Md. Laws 184, 372; 1994 Md. Laws 712; 1998 Md. Laws 372, 373.

ment.[211] This amendment, among other things, broadened the definition of "abuse" so as to include "sexual abuse."[212] This further expansion of the statute on the heels of *Fabritz*, and subsequent amendments thereto, could logically be construed as the Legislature acquiescence to the court's interpretation of the statute. Thus, it can be expected that the court will continue to interpret the Legislature's expansion of the child abuse statute as a mandate to attach criminal liability in cases of a caregiver's failure to act on behalf of a child in cases of physical and sexual abuse by a third party.

b. Consistent with Prior Case Law.—The court's holding in *Degren* was also a logical extension of prior case law in Maryland. The *Degren* court properly recognized the decision in *Fabritz* as a public policy mandate that the protection of children from abuse must be an utmost priority.[213] This mandate was evidenced by the *Fabritz* court's willingness to interpret broadly the child abuse statute to include an act of omission as an offense, although it was not expressly provided for in the statute.[214]

Furthermore, there was a clear parallel between the facts in *Degren* and those in the case of *Fabritz*, such that the Court of Appeals could logically extend the *Fabritz* principle to *Degren*. As the *Degren* court noted, the "only real distinction [between] this case [and *Fabritz*] is that Jennifer was abused sexually rather than physically."[215] The court was clearly correct.

First, in both cases there was no issue as to whether the defendants fell within the class of persons covered by the statute. In *Fabritz*, the defendant was the parent of the child.[216] In *Degren*, petitioner did not dispute that she was responsible for the supervision of Jennifer.[217]

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211. *See supra* notes 56-60 and accompanying text (discussing the 1974 amendment to the Maryland child abuse statute).

212. *See* Act of April 30, 1974, ch. 554, 1974 Md. Laws 1887, 1889.

213. *See Degren*, 352 Md. at 419-20, 722 A.2d at 896; *see also* State v. Fabritz, 276 Md. 416, 423-24, 348 A.2d 275, 280 (1975) (concluding "it [is] evident that the Legislature . . . plainly intended to broaden the area of proscribed conduct punishable in child abuse cases").

214. *Fabritz*, 276 Md. at 424, 348 A.2d at 280 (interpreting the Legislature's act of repealing the "narrow measure of criminality in child abuse cases then provided in § 35A," the Legislature "redefin[ed] the offense" to no longer "require that the injury result from a physical assault upon the child or from any physical force initially applied by the accused individual").

215. *Degren*, 352 Md. at 416, 722 A.2d at 895.

216. *See Fabritz*, 276 Md. at 418, 348 A.2d at 276.

217. *See Degren*, 352 Md. at 409 n.5, 722 A.2d at 891 n.5 ("Petitioner does not dispute that she was a person with responsibility for the supervision of Jennifer pursuant to section 35C(b)(1).").

Next, in both cases the children suffered abuse at the hands of a third party.[218] Also, in both *Fabritz* and *Degren*, although there was insufficient evidence to show that either defendant had caused an overt act of abuse against the child,[219] both defendants had notice of ongoing abuse and allowed the abuse to continue, a crucial element of the offense charged.[220] Finally, in both *Fabritz* and *Degren*, defendants failed to intervene on the child's behalf.[221]

In other words, based on the above cases, liability for passive participation in child abuse would be predicated upon a showing of (1) a duty to the minor child; (2) the minor child's exposure to abuse; (3) the caregiver's awareness of the continued abuse; and (4) the caregiver's failure to intervene to prevent or stop the abuse. All four elements were present in *Fabritz* and *Degren*.

The only significant difference between the two cases, other than the type of abuse inflicted, was the result of the injuries sustained. In *Fabritz*, the abuse resulted in death.[222] In *Degren*, the injuries were not as physically extreme, but were no less destructive.[223] Indeed, the *Degren* court rejected the notion that sexual abuse is a less serious offense than physical abuse, emphasizing the intent of the Legislature to address the "extensive emotional, psychological, or physical damage that sexual abuse can cause a child" by not requiring physical injury as a predicate to charging someone with child abuse.[224] The court approvingly quoted the opinion of the North Carolina Court of Appeals in *State v. Ainsworth*[225] which wisely recognized that "[w]hile the threat

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218. *See id.* at 405-08, 722 A.2d at 889-91 (describing the various incidents of sexual abuse Jennifer endured from those entrusted with her care); *Fabritz*, 276 Md. at 418, 348 A.2d at 276 ("Windy was brought to the . . . [h]ospital . . . in a badly beaten condition with approximately seventy bruises or contusions covering her body.").

219. *See Degren*, 352 Md. at 426, 722 A.2d at 899 (noting that "[p]etitioner disputed [the child's] claim that she was involved in the [sexual] act"); *Fabritz*, 276 Md. at 420, 348 A.2d at 278 (noting the State's argument that "although there was no evidence that [the mother] was the individual who beat [the child], she was fully aware of her child's beaten condition" (internal quotation marks omitted)).

220. *See Degren*, 352 Md. at 425, 722 A.2d at 899 ("[P]etitioner not only knew her husband was engaged in sexual intercourse with Jennifer, but sat on the same bed and watched . . . . Additionally . . . petitioner was aware of and witnessed Rick and Jennifer engaged in sexual intercourse."); *Fabritz*, 276 Md. at 425, 348 A.2d at 280 (noting "that Virginia knew of Windy's severely beaten condition is manifest from the evidence").

221. *See Degren*, 352 Md. at 426, 722 A.2d at 899 ("[P]etitioner did not try to intervene or protect the child."); *Fabritz*, 276 Md. at 425, 348 A.2d at 280 ("Virginia failed to seek or obtain any medical assistance although, as the evidence heretofore outlined so plainly indicates, the need therefore was obviously compelling and urgent.").

222. *Fabritz*, 276 Md. at 418, 348 A.2d at 276.

223. *Degren*, 352 Md. at 405-08, 722 A.2d at 889-91.

224. *Id.* at 421, 722 A.2d at 897.

225. 426 S.E.2d 410 (N.C. App. 1993).

of physical harm, including death [is] arguably more immediate than that here, it was no less severe . . . . [T]he child here was exposed to an event which could have severe psychological repercussions requiring long term treatment."[226]

Moreover, this abuse would likely be the type that even Judge O'Donnell, who dissented in *Fabritz*, would have agreed was within the reach of the child abuse statute.[227] Judge O'Donnell argued that the child abuse statute was intended to punish acts that fell outside the ambit of common law assault, but short of manslaughter.[228] Thus, according to Judge O'Donnell, under the facts in *Fabritz*, the defendant could have been prosecuted under a theory of common law manslaughter.[229] The injuries sustained by Jennifer, however, would fall within the gap that the child abuse statute was meant to fill because they were the result of sexual abuse. Indeed, Judge O'Donnell stated that he could visualize "facts which might establish a continuing 'course of conduct of cruel and inhumane' treatment, resulting in 'physical injury' to a minor child."[230] Nonetheless, based on facts before him in *Fabritz*,[231] he did not consider the defendant's failure to seek immediate medical attention over an eight-hour period to be a "course of conduct" constituting "cruel and inhumane treatment."[232] Judge O'Donnell argued that the defendant may have made "a poor and even negligent attempt at treatment," however, it was made "in good faith."[233]

In contrast, based on the facts in *Degren*, Ms. Degren could not have made a "good faith" decision justifying her failure to stop or to prevent the sexual abuse of Jennifer by her husband and a male houseguest. Nor, the court concluded, was Ms. Degren in any danger

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226. *Degren*, 352 Md. at 424, 722 A.2d at 899 (internal quotation marks omitted) (quoting *Ainsworth*, 426 S.E.2d at 416).

227. *See supra* notes 85-87 and accompanying text (discussing Judge O'Donnell's dissent in *Fabritz*).

228. *See Fabritz*, 276 Md. at 433, 348 A.2d at 285 (O'Donnell, J., dissenting).

229. *Id.*

230. *Id.* at 434, 348 A.2d at 285.

231. *Id.* Justice O'Donnell explained:

> There is no evidence that the appellee's negative action in failing to more promptly obtain medical assistance imputed to her any intent to permit the child to continue to suffer or to die. When she noticed that the child was in a semi-conscious state, she fed her liquids to give her strength. Upon noticing a deterioration in her physical condition, she called upon a friend to assist her. The child was then bathed with alcohol, her temperature taken and she was dressed in pajamas.

Id.

232. *Id.* (internal quotation marks omitted).

233. *Id.*

of death or imminent harm by coming to the aid of Jennifer.[234] In her testimony, Ms. Degren stated that she did not interfere because at times her husband could be abusive and she "was afraid that he would hit [her]."[235] The court found, however, that "[t]here was no evidence in this record of any such abuse during this or any other instance."[236] It is worthwhile to note that the court implied a distinction between those caretakers who choose not to protect their children and should be held accountable, and those who have no power to protect their children and should not be held criminally liable.[237] The court acknowledged that "[t]his Court is not blind to the unfortunately all too common battered-spouse scenario in which persons with abusive spouses decline to act or protect themselves or others for fear of a violent retaliation by their spouses."[238] This sentiment was echoed in *Walden*.[239] In *Walden*, the North Carolina Supreme Court declared that "[it] is not to say that parents have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children."[240]

Therefore, the *Degren* court appears to acknowledge the availability of a possible affirmative defense should the circumstances of a case suggest the need for such.[241] This possibility should quell possible concerns that extending liability to a spouse who fails to protect his or her child from abuse by a third party, usually a husband, would cause a battered spouse to be victimized twice, once by the abusing partner and a second time by the criminal justice system.[242]

c. Consistent with the National Trend Toward Protecting Our Children.—The *Degren* court's willingness to extend the scope of criminal liability beyond acts of commission to acts of omission in cases of sexual abuse by supervising adults is consistent with our national policy to reduce and ultimately to prevent child abuse and neglect in

234. *Degren*, 352 Md. at 425 n.12, 722 A.2d at 899 n.12.

235. *Id.* at 406, 722 A.2d at 890 (internal quotation marks omitted).

236. *Id.* at 425 n.12, 722 A.2d at 899 n.12.

237. *See id.* (discussing the "battered-spouse scenario").

238. *Id.*

239. State v. Walden, 293 S.E.2d 780, 786 (N.C. 1982).

240. *Id.*

241. *See* Karen D. McDonald, *Michigan's Efforts to Hold Women Criminally and Civilly Liable for Failure to Protect: Implications for Battered Women*, 44 WAYNE L. REV. 289, 301 (1998) ("Currently, four states have affirmative defenses to omission statutes. The Iowa, Minnesota, Oklahoma and Texas statutes state that a women [sic] can assert an affirmative defense if she reasonably believes that to intervene would cause her or her children greater harm.").

242. *See id.* at 299-303; *see also* Peters-Baker, *supra* note 102, at 1020-24 (discussing the "Catch 22" in which many battered women are placed when considering how to react to their children being abused by their spouse).

America.[243] Statistics on child abuse and neglect in the United States are both shameful and alarming.[244] Public outcry over high profile cases, such as the Lisa Steinberg case that occurred in New York in 1987,[245] highlights the public's desire to hold passive caregivers criminally liable for failing to protect their children. Perhaps, in response to the staggering statistics and the public outcry over cases such as Lisa's, there is a national trend in our courts to extend criminal liability beyond the abusers to the enabler who fails to intervene on the child's behalf.[246]

The bases for prosecution vary according to current state law. Charges have been leveled through various approaches including the following: holding that a parent has a legal duty to protect her child; holding condoning parents to a reasonable person standard; liberally interpreting existing child abuse statutes to include condoning parents; broadly construing the notion of proximate cause to include failure to seek medical attention for one's child; and construing child

243. *See Degren*, 352 Md. at 424-25, 722 A.2d at 899; *see also* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES 17-18 (1995) (providing a mission statement of the U.S. Advisory Board of Child Abuse and Neglect (NCCAN)). NCCAN was established pursuant to the Child Abuse Prevention and Treatment Act (CAPTA) (Public Law 93-247), as amended, which requires an annual report to be provided to the Secretary of Health and Human Services. *Id.* at 19. The report evaluates the nation's efforts to accomplish the purpose of CAPTA and to recommend a "national policy to reduce and ultimately prevent" child abuse and neglect in America. *Id.*

244. *See generally* U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILD MALTREATMENT 1997: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (1999) (providing various statistics concerning child abuse in different states). The National Child Abuse and Neglect Data System (NCANDS) is the Administration of Children, Youth and Families' (ACYF) primary data collection, analysis, and information dissemination program on child maltreatment in the United States. *See id.* at 1-1.

245. Lisa Steinberg was a six-year-old child who ultimately died as a result of a blow to her head delivered by her adoptive father. *See* People v. Steinberg, 595 N.E.2d 845 (N.Y. 1992). What further incensed the public was that Lisa's father's live-in companion, Hedda Nussbaum, failed to seek medical attention for Lisa as she lay comatose on the bathroom floor for several hours while Ms. Nussbaum freebased cocaine in the next room, knowing of the child's condition. *See* J. Kaye, *Penal Law: Failure to Obtain Medical Care*, N.Y.L.J., June 25, 1992, at 21 (describing the events leading up to Lisa Steinberg's death).

246. *See* Adams, *supra* note 8 (discussing the national trend of states holding parents criminally liable for condoning the abuse of their children); *see also supra* note 33 (citing examples of cases in which the court found criminal liability for a supervising adult's failure to prevent abuse on a child's behalf).

abuse as a general intent crime.[247] Furthermore, child abuse statutes are in place in every state.[248]

Acknowledging this "modern trend in broadly recognizing and punishing all forms of child abuse," the *Degren* court referenced in its opinion the decisions of several foreign jurisdictions.[249] Of particular relevance to the *Degren* court was the court's reasoning in *Ainsworth*, which shared a similar fact pattern to the case *sub judice*.[250] In *Ainsworth*, the court extended criminal liability for a parent's failure to act to prevent the *sexual* abuse of their child.[251] This decision was relied, in part, on a prior state holding in *Walden*, in which a supervising adult was held criminally liable for an omission to act in a case of *physical* abuse.[252] This parallel in circumstances between *Degren* and *Ainsworth* did not go unnoticed by the *Degren* court.[253] Thus, consistent with prior case law both within and outside of its borders, the *Degren* court extended criminal liability to the passive caregiver in cases of sexual child abuse.

5. Conclusion.—Degren v. State signals the court's willingness to continue to give the child abuse statute broad interpretation to extend criminal liability not only to the actual abuse, but to the passive caregiver who fails to intervene on behalf of the child in cases of physical or sexual abuse. Furthermore, the court's recognition of the battered spouse syndrome hints to the fact that, under certain circumstances, it may be used as an affirmative defense in failure to act cases. This, however, remains to be tested.

CATHLEEN C. OPEL

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247. *See* Adams, *supra* note 8, at 524 (enumerating the various approaches the courts and legislatures have taken to extend criminal liability to passive caregivers).

248. *Id.* at 528 n.49 (providing statutory cites of child abuse statutes that are in place in all fifty states of the U.S., and the District of Columbia).

249. *Degren*, 352 Md. at 424, 722 A.2d at 899.

250. *Id.* at 421-24, 722 A.2d at 897-99; *see also* State v. Ainsworth, 426 S.E. 410, 415-16 (N.C. App. 1993) (holding criminally liable the victim's mother for her failure to prevent the rape of her twelve-year-old son while she was present and watching); *supra* notes 133-138.

251. *Ainsworth*, 426 S.E.2d at 416.

252. *Id.* at 415; *see also Walden*, 293 S.E.2d at 787 (holding that "the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed").

253. *See Degren*, 352 Md. at 422-24, 722 A.2d at 897-99. Indeed, the *Degren* court discussed at length the facts and reasoning of the court in *Ainsworth*. *Id.* at 421-24, 722 A.2d at 897-99.

VII. CRIMINAL PROCEDURE

A. *Traffic Stops, Consent, and Seizure: Maryland's Departure from Modern Fourth Amendment Analysis*

In *Ferris v. State*,[1] the Court of Appeals held that a "stop" for speeding on an interstate highway ended when the officer presented the driver with a citation and that any further questioning by the officer constituted a seizure within the meaning of the Fourth Amendment.[2] The court explained that although the suspect voluntarily answered the officer's questions and was not ordered by the officer to exit his vehicle, a "reasonable person would not have believed that he was free to terminate the encounter with [the trooper]."[3] Therefore, the court concluded that the suspect did not give consent to the officer's continued questioning or to the prolonged traffic stop.[4] Because the initial traffic stop ended when the officer issued the citation and the driver of the automobile did not consent to further questioning, the court reasoned that the officer must have had a "reasonable, articulable suspicion" to begin the second stop and questioning that led to the discovery of a sizeable quantity of marijuana in the car.[5] The court found that the driver's bloodshot eyes and nervousness and the absence of alcohol on his breath did not constitute a reasonable suspicion to justify the second stop during which the contraband was found.[6]

Ferris is an extension of recent Maryland case law holding police officers to a high standard of review when the legality of a prolonged traffic stop based on reasonable suspicion is scrutinized under the

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1. 355 Md. 356, 735 A.2d 491 (1999).

2. *See id.* at 373, 384, 735 A.2d at 500, 506; *see also* U.S. CONST. amend. IV. The Fourth Amendment states that the

> right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Id.

3. *Ferris*, 355 Md. at 377, 735 A.2d at 502.

4. *See id.* at 384, 735 A.2d at 506 (noting that the "collective coerciveness of the totality of the circumstances" evidenced a lack of consent on the part of the suspect).

5. *See id.* (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)) (holding that the police officer must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion"). After questioning both the driver and the passenger of the car, a "gallon-sized plastic baggie" of marijuana was found in a book bag inside the car. *Id.* at 364, 735 A.2d at 495.

6. *See id.* at 393, 735 A.2d at 511.

Fourth Amendment.[7] The court, however, departed from the governing United States Supreme Court decisions regarding consent, and subsequent cases decided similarly could therefore be vulnerable to review and to possible reversal by the high court.[8]

1. The Case.—On May 7, 1996, Peter Michael Ferris and one passenger, Michael Discher, were traveling along Interstate-70 in western Maryland, heading from Philadelphia to West Virginia University in Morgantown, West Virginia.[9] Maryland State Trooper Andrew Smith (Trooper Smith), using a laser device, clocked Mr. Ferris's speed at ninety-two miles per hour in a posted sixty-five miles per hour speed limit zone.[10] Trooper Smith pulled over Mr. Ferris without incident, collected Mr. Ferris's driver's license and registration, and returned to his patrol car to write the citation.[11] During this encounter, Trooper Smith stated that he noticed that Mr. Ferris's eyes were "bloodshot and [that] he did appear a little nervous . . . [and] fidgety."[12] Trooper Smith also observed that Mr. Ferris and Mr. Discher both looked back at the patrol car "quite frequently."[13] At this time, Deputy John C. Martin of the Washington County Sheriff's Department arrived at the scene of the stop and activated his emergency lights on his patrol car.[14] Deputy Martin also observed that Mr. Ferris and Mr. Discher were "moving around in the vehicle a lot and looking around"; he passed this observation along to Trooper Smith.[15]

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7. *See, e.g.*, Graham v. State, 119 Md. App. 444, 471, 705 A.2d 82, 94 (1997) (holding that a 25-minute period between the beginning of a traffic stop and the arrival of a drug-sniffing dog was unreasonable); Munafo v. State, 105 Md. App. 662, 676, 660 A.2d 1068, 1075 (1995) (concluding that the continued detention of an individual after the completion of an initial traffic stop was not supported by reasonable suspicion and was therefore unconstitutional); Snow v. State, 84 Md. App. 243, 246, 578 A.2d 816, 817 (1990) (finding that an officer did not have reasonable suspicion to detain a driver when the driver failed to make eye contact with him).

8. *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973) (holding that when a suspect is not in custody, the state must show that the consent given was voluntary and this is to be determined under the totality of the circumstances, although failure to inform someone of his right to refuse is not dispositive—it is a factor in determining lack of consent). The Attorney General of Maryland did not petition for a writ of certiorari to the United States Supreme Court in this case. Interview with the Maryland Attorney General's Office (Dec. 16, 1999).

9. *See Ferris*, 355 Md. at 362, 364, 735 A.2d at 494-95.

10. *See id.* at 362, 735 A.2d at 494.

11. *See id.*

12. *Id.*

13. *Id.*

14. *See id.*

15. *Id.* at 363, 735 A.2d at 494.

After writing the citation, Trooper Smith returned to Mr. Ferris's car, handed back Mr. Ferris's license and registration, and had Mr. Ferris sign the citation.[16] Trooper Smith then proceeded to ask whether Mr. Ferris "would mind stepping to the back of his vehicle to answer a couple of questions."[17] According to Trooper Smith, Mr. Ferris stated that he "didn't mind."[18] Mr. Ferris and Trooper Smith walked around to the back of the vehicle while Deputy Martin watched Mr. Discher, who was still seated in the car.[19] Trooper Smith testified at the initial suppression hearing that Mr. Ferris's eyes were bloodshot, both Mr. Ferris and Mr. Discher appeared very nervous, and there was no odor of alcohol on the breath of either individual.[20]

Trooper Smith asked Mr. Ferris whether he had smoked any drugs before the traffic stop.[21] Mr. Ferris replied that he had not, even though Trooper Smith testified that Mr. Ferris grew more nervous when asked this question.[22] Trooper Smith repeated the question to Mr. Ferris, asking if he "was sure that he hadn't smoked any drugs."[23] At this time, Trooper Smith pointed out to Mr. Ferris that he had observed that Mr. Ferris's eyes were bloodshot, he was nervous, and there was no odor of alcohol on his breath.[24] Mr. Ferris then admitted that he and Mr. Discher had "smoked a 'joint' in Philadelphia about three hours earlier."[25] When asked whether Mr. Discher was in possession of any controlled substance, Mr. Ferris acknowledged that Mr. Discher had a "small amount of marijuana" in the car.[26] Confronted with this information, Mr. Discher turned over a "small baggie" of marijuana.[27] A subsequent search of the car turned up a "gallon-sized plastic baggie . . . containing a compressed, green vegetable matter" substance, which was later identified as marijuana.[28]

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16. *See id.*

17. *Id.* The court's account of the exchange between Trooper Smith and Mr. Ferris noted that Trooper Smith did not inform Mr. Ferris that he was free to leave after his citation was signed. *Id.*

18. *Id.*

19. *See id.*

20. *See id.* Trooper Smith explained that these factors led the officer to conduct further questioning after issuing the citation. *See id.*

21. *Id.* at 363, 735 A.2d at 495.

22. *See id.*

23. *Id.* at 364, 735 A.2d at 495.

24. *See id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

Mr. Ferris was charged with operating a motor vehicle in excess of the posted speed limit,[29] possession of marijuana,[30] and possession of marijuana in sufficient quantity to indicate reasonably an intent to distribute that substance.[31] Prior to trial, Mr. Ferris moved to suppress all evidence that he claimed was obtained illegally.[32] The trial court denied Mr. Ferris's motion to suppress, finding that the traffic stop did not end when he signed the citation and that Mr. Ferris had voluntarily answered Trooper Smith's questions.[33] Based on the totality of the circumstances, the trial court held that there was no unreasonable seizure under the Fourth Amendment.[34]

In an unpublished decision, the Court of Special Appeals affirmed the ruling of the trial court, concluding that the trial court's finding that Mr. Ferris consented to the search was not clearly erroneous.[35] Moreover, the intermediate appellate court held that Trooper Smith had a reasonable, articulable suspicion to justify a second stop based on Mr. Ferris's outward appearance, mannerisms, and behavior.[36] In a lone dissent, Judge Thieme argued that Mr. Ferris was seized under the Fourth Amendment, and that Trooper Smith's "request" to exit the car was "indistinguishable from a command."[37] He further found that without consent, the detention of Mr. Ferris could not be justified because the officer lacked reasonable suspicion.[38]

The Court of Appeals granted Mr. Ferris's petition for writ of certiorari to consider the following questions:

> (1) whether an operator of a motor vehicle is seized within the meaning of the Fourth Amendment when he is asked to get out of his car for questioning after a traffic stop is completed, and (2) whether the Court of Special Appeals erred in finding that the seizure of Mr. Ferris was justified by reasonable, articulable suspicion.[39]

2. Legal Background.—Fourth Amendment jurisprudence in Maryland is well developed; however, prior to *Ferris*, the court had never

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29. *See* MD. CODE ANN., TRANSP. I § 21-801.1 (1999).
30. *See* MD. ANN. CODE art. 27, § 287 (1999).
31. *See Ferris*, 355 Md. at 364, 735 A.2d at 495; *see also* MD. ANN. CODE art. 27, § 286(a)(1) (1999).
32. *See Ferris*, 355 Md. at 364, 735 A.2d at 495.
33. *See id.* at 366-67, 735 A.2d at 496.
34. *See id.*
35. *See id.*
36. *See id.*
37. *Id.*
38. *See id.*
39. *Id.* at 368, 755 A.2d at 497.

expressly defined the confines of a "stop" stemming from a traffic violation. Moreover, it has never addressed whether information provided pursuant to an officer's questions, but after a citation was issued, could be considered consent.[40] Similarly, the United States Supreme Court had yet to address the duration of a "stop" when a driver is pulled over for a traffic violation or the validity of consent after the duration of the initial stop has terminated. In examining Maryland and United States Supreme Court Fourth Amendment jurisprudence, however, a disparity in reasoning with regard to these issues is apparent. To examine this disparity, it is necessary to analyze Fourth Amendment issues in traffic stops and related issues of consent.

a. Traffic Stops and Seizures of the Person—When a "Second Stop" Occurs.—In *Ferris*, the Court of Appeals first addressed the question of whether a "second stop" had occurred when the trooper began questioning Mr. Ferris after the officer had already issued a traffic citation.[41] The court concluded that the resolution of this issue was essential to determine whether the trooper needed additional justification to "seize" Mr. Ferris for Fourth Amendment purposes.[42]

In *Michigan v. Chesternut*,[43] the United States Supreme Court addressed the question of what constitutes a seizure in the context of determining whether a seizure occurred when an individual was chased by police.[44] In *Chesternut*, a police officer on a routine patrol observed Michael Chesternut fleeing at the sight of the patrol car.[45] After driving along side Chesternut for a short distance, the officer observed him discard several packets later discovered to contain codeine.[46] The Court considered whether the officer's "investigatory pursuit" constituted a seizure under the Fourth Amendment.[47] Justice Blackmun, writing for the majority, refused to adopt a bright-line rule

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40. *See, e.g.*, Graham v. State, 119 Md. App. 444, 705 A.2d 82 (1997) (holding that a 25-minute interval between the beginning of a traffic stop and the arrival of a drug-sniffing dog was unreasonable); Munafo v. State, 105 Md. App. 662, 660 A.2d 1068 (1995) (holding that continued detention of an individual after completion of an initial traffic stop was unconstitutional because the officer lacked reasonable suspicion); Snow v. State 84 Md. App. 243, 578 A.2d 816 (1990) (holding that a driver's lack of eye contact with an officer did not constitute reasonable suspicion for purposes of detention).

41. *Ferris*, 355 Md. at 368, 735 A.2d at 497.

42. *Id.*

43. 486 U.S. 567 (1988).

44. *Id.* at 569.

45. *Id.*

46. *See id.*

47. *See id.*

for whether or not a police pursuit constituted a per se seizure.[48] Instead, he maintained that an individual has been seized when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[49] Blackmun explained that while this test was "necessarily imprecise," it could be consistently applied to various police encounters because it embodied an objective standard, namely how a "reasonable man" would respond to the police action at issue.[50]

Applying this test to the case at hand, the Court concluded that Chesternut had not been "seized" for Fourth Amendment purposes.[51] The Court reasoned that a reasonable person would not have considered himself seized in this situation because the police did not take any actions to hinder or to alert Chesternut, such as activating sirens, commanding him to halt, or hindering his freedom of movement.[52]

In 1991, in *California v. Hodari D.*,[53] the United States Supreme Court clarified its seizure jurisprudence. In *Hodari D.* the Court held that for a "seizure" to have occurred, there must be "either physical force . . . or, where that is absent, submission to the assertion of authority."[54] Justice Scalia, writing for the majority, clarified the Court's seizure test previously articulated in *Chesternut*.[55] The *Hodari D.* Court noted that the language of this test read "only if in view of all the circumstances . . ." not "whenever, in view of all the circumstances . . . ."[56] Therefore, the Court reasoned that although a reasonable

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48. *See id.* at 572-73. Justice Blackmun was uncomfortable restricting the review of police conduct to "particular details of [the officer's] conduct in isolation." *Id.* at 573. Instead, he wished to formulate a test that would be "designed to assess the coercive effect of police conduct, taken as a whole . . . ." *Id.*

49. *Id.* at 573 (internal quotation marks omitted) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

50. *Id.* at 573-74.

51. *Id.* at 574.

52. *Id.* at 575.

53. 499 U.S. 621 (1991).

54. *Id.* at 626. Justice Scalia articulated his definition of seizure under the Fourth Amendment:

> The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . . . It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure.

Id.

55. *See id.* at 627-28; *supra* notes 49-50 and accompanying text (stating that the test for determining whether a person was seized within the meaning of the Fourth Amendment is whether, "in view of all of the circumstances . . . a reasonable person would have believed that he was not free to leave").

56. 499 U.S. at 628 (emphasis added).

person, in view of the totality of the circumstances, may not believe he is free to leave, it does not necessarily follow that the individual has been seized for purposes of the Fourth Amendment.[57] Instead, to necessitate a finding of seizure, there must be either physical force or a submission to the assertion of authority.[58]

Under Maryland law, a person has been seized within the meaning of the Fourth Amendment when "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[59] In *State v. Lemmon*,[60] the Court of Appeals held that a suspect was seized for Fourth Amendment purposes when he was pursued by a police officer.[61] In *Lemmon*, several police patrol cars responded to an all-points bulletin that there was a narcotics offense being committed on a certain city block in Baltimore.[62] Upon arriving at the area specified in the bulletin, the police approached a group of eight to ten black males.[63] The officers identified themselves and asked Mr. Lemmon to, "come here," whereupon Mr. Lemmon ran away from the officers and dropped a vial containing valium while running.[64] The court concluded that Mr. Lemmon was seized when the officer ordered him to, "come here," because there was "no doubt that a reasonable person would have believed that he was not free to leave."[65] The court based this conclusion on the fact that the suspect was approached by two officers, ordered to "come here," and was pursued when he ran.[66] The court also addressed whether reasonable suspicion warranted the officers' seizure of Mr. Lemmon.[67] The court determined that it would examine the totality of the circumstances to decide whether the officer

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57. *Id.*

58. *See id.* at 628-29.

59. *See* State v. Lemmon, 318 Md. 365, 372, 568 A.2d 48, 52 (1990) (citing Michigan v. Chesternut, 486 U.S. 567, 573 (1988)).

60. 318 Md. 365 (1990), 568 A.2d 48 (1990).

61. *Id.* at 373-74, 568 A.2d at 53.

62. *Id.* at 369, 568 A.2d at 50. The dispatcher did not provide many details as to the description of the suspect, or suspects, committing the narcotics offense. *See id.* The only information provided was that there was, "a black male in the area selling narcotics." *Id.*

63. *See id.*, 568 A.2d at 51.

64. *Id.* at 370, 568 A.2d at 51.

65. *Id.* at 373-74, 568 A.2d at 53. The court also stated that it was not necessary for Mr. Lemmon to be physically restrained in order for him to be considered seized for purposes of the Fourth Amendment. *See id.* at 374-75, 568 A.2d at 53.

66. *See id.* at 374, 568 A.2d at 53.

67. *Id.* at 375-76, 568 A.2d at 54. The court looked to whether there were "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" and whether there is "reasonable suspicion that someone is about to commit or has just committed a crime." *Id.* at 376, 568 A.2d at 54 (quoting Anderson v. State, 282 Md. 701, 704-05, 387 A.2d 281 (1978)).

had reasonable suspicion sufficient to justify a seizure of Mr. Lemmon.[68] The court held that the flight of a suspect did not create reasonable suspicion and that the abandonment of the drugs was involuntary.[69]

Prior to the Court of Appeals decision in *Ferris*, the Court of Special Appeals examined the validity of prolonged traffic stops in *Snow v. State*.[70] The sole issue considered in *Snow* was whether the police officer had a "reasonable and articulable suspicion" to justify detention of a driver after issuing a traffic warning for speeding.[71]

In *Snow*, the driver (Snow) was stopped for travelling sixty-four miles per hour in a fifty-five-mile-per-hour zone.[72] The officer (Trooper Paros) testified that Snow seemed nervous and would not make eye contact with him.[73] The trooper proceeded to collect Snow's driver's license and ask him where he and his passenger were headed.[74] The individuals replied that they were traveling from Philadelphia to Washington, D.C., to visit an acquaintance.[75] Trooper Paros noticed three air fresheners hanging from the rear view mirror in Snow's car, and he believed the air fresheners were a method of concealing the odor of narcotics.[76] Trooper Paros ordered both men out of the car, returned Snow's driver's license, issued him a written warning, and asked permission to search the car.[77] Snow refused to give permission for a search; nevertheless, Trooper Paros conducted a drug scan using a dog.[78] The officer discovered three bags of heroin

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68. *See id.* at 379, 568 A.2d at 55.

69. *Id.*, 568 A.2d at 56. The court considered several factors in determining that the officers did not have reasonable suspicion to detain Mr. Lemmon. First, the dispatcher's source was an anonymous tip, thus casting doubt on the credibility of the source. *See id.* Second, the observation of two men talking on a street corner was not enough to bring about reasonable suspicion that a crime had occurred or was occurring. *See id.* Finally, the Baltimore city block on which the arrest took place was not "known for criminal activity." *Id.*

70. 84 Md. App. 243, 578 A.2d 816 (1990).

71. *Id.* at 246, 578 A.2d at 816 (citing Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that an individual may be stopped for a police officer to make inquiries "where [he] observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous")).

72. *Id.* at 246, 578 A.2d at 817.

73. *See id.* at 247, 578 A.2d at 818.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

in an overnight bag in the rear of the car, and arrested both Mr. Snow and his passenger.[79]

The court applied the *Lemmon* totality of the circumstances test to determine whether in view of all of the circumstances, a reasonable person in Snow's position would have felt free to leave.[80] The court concluded that Snow was seized when he was told by Trooper Paros to remain by the side of the road while the dog scanned his car.[81] In analyzing whether the officer had reasonable suspicion to justify the seizure, the court examined six factors relevant to that determination.[82] Ultimately, the court concluded that the facts upon which Trooper Paros based his suspicion were insufficient to justify the seizure.[83]

Subsequent to *Lemmon* and *Snow*, and the Supreme Court's clarification in *Hodari D.*, the Court of Special Appeals considered whether the continued detention of a vehicle after issuance of a traffic citation constituted a separate and distinct stop under the Fourth Amendment in *Munafo v. State*.[84] In *Munafo*, police paced Munafo's car traveling nineteen miles per hour in excess of the posted speed limit.[85] After stopping the vehicle, the officer, who recognized Munafo from an earlier encounter, began a casual conversation and inquired whether Munafo had any weapons or drugs in the car and whether he could conduct a search.[86] Munafo stated that he had no weapons or drugs and that he did not consent to a search of his car.[87] After verifying Munafo's car rental agreement and issuing him a warning, the officer "formulated a hunch" that Munafo had drugs in the car.[88] A second

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79. *See id.* at 248, 84 Md. App. at 818.

80. *Id.* at 249, 578 A.2d at 819 (noting that "whenever an officer restrains the freedom of a person to walk away, he has seized that person") (internal quotation marks omitted) (quoting State v. Lemmon, 318 Md. 365, 375, 568 A.2d 48, 53 (1990))).

81. *See id.* at 259, 578 A.2d. at 824.

82. *See id.* at 254, 578 A.2d. at 821 (explaining that the six relevant variables were: "(1) the appearance of the detainee, (2) conduct, (3) criminal record, (4) environment, (5) police purpose, and (6) source of information" (quoting Mosley v. State, 45 Md. App. 88, 92-93, 411 A.2d 1081, 1085 (1980))).

83. *See id.* at 260, 578 A.2d at 824 (noting that the trooper's suspicion arose from four factors: Mr. Snow's reluctance to make eye contact; the fact that the Philadelphia-Washington corridor was a known route for drug couriers; three air fresheners were hanging in Mr. Snow's car; and Mr. Snow did not consent to the search of his vehicle).

84. 105 Md. App. 662, 669-70, 660 A.2d 1068, 1071 (1995).

85. *Id.* at 666, 660 A.2d at 1070.

86. *See id.* at 666-67, 660 A.2d at 1070 (explaining that the officer had stopped Munafo for the same infraction a year earlier although that stop did not result in a search).

87. *See id.*

88. *Id.* at 667-68, 660 A.2d at 1070. There was some discrepancy as to whether the officer who wrote the warning had given the license and rental agreement back to Mr. Munafo before the inquiry into whether the suspect had drugs in the car began. *See id.*

officer arrived on the scene at this time, and while the first officer talked to Munafo, the second officer walked around to the other side of the car where he spotted a "dark-colored substance" that appeared to be marijuana on the console between the two front seats of the car.[89]

The court quoted *Florida v. Royer*, in stating that "the detention of a person 'must be temporary and last no longer than to effectuate the purpose of the stop.'"[90] Once the purpose of the stop has been satisfied, the court held that "the continued detention of a vehicle and its occupant(s) constituted a second stop, and must be independently justified by reasonable suspicion."[91]

The court held that because there had been a second stop of Munafo, that stop had to have been premised on reasonable suspicion of criminal activity.[92] The court utilized the totality of circumstances approach as formulated in *Lemmon* to determine whether a reasonable, articulable suspicion existed in light of all of the surrounding circumstances.[93] The court found that the officer's grounds for reasonable suspicion—(1) Munafo's prior arrest for drug-related offenses, and (2) that he "appeared" to be hiding something under his arm—were not sufficient to justify his further detention.[94]

In 1998, the Court of Special Appeals decided two more cases dealing with seizures in the context of a traffic stop. In *Graham v. State*,[95] the court decided whether an officer may detain a passenger in a car for the length of time necessary to wait for the arrival of a drug-sniffing dog.[96] After stopping a vehicle for exceeding the posted

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The substance was discovered by the second officer, who used a flashlight to see into the passenger-side window of the car. *See id.* In addition to the marijuana, cocaine was also found in the car. *See id.*

89. *See id.* at 668, 660 A.2d at 1070-71.

90. *Id.* at 670, 660 A.2d at 1071-72 (quoting Florida v. Royer, 460 U.S. 491, 500 (1983)).

91. *Id.* at 670, 660 A.2d at 1072. The court stated that "[o]nce [the officer] learned that appellant's license and registration were in order, he was required to end the stop promptly and send appellant on his way . . . . [H]e did not tell appellant that he was free to leave . . . . [The] continued detention of appellant constituted a separate stop." *Id.* at 673, 660 A.2d at 1073.

92. *See id.* at 673, 660 A.2d at 1073 (citing Derricott v. State, 327 Md. 582, 593, 611 A.2d 592 (1992)) (holding further that such reasonable suspicion must rise above the level of a "mere belief or hunch").

93. *See Munafo*, 105 Md. App. at 674-76, 660 A.2d at 1073-75.

94. *Id.* at 676, 660 A.2d at 1074-75. The court seemed particularly distressed by the officer's use of the term "hunch" to justify his reasoning for continued detention of Mr. Munafo. *Id.* at 676, 660 A.2d at 1074-75 (stating that "a hunch, without more does not rise to the level of reasonable suspicion").

95. 119 Md. App. 444, 705 A.2d 82 (1998).

96. *Id.* at 447, 705 A.2d at 83-84.

speed limit, the officer questioned the driver and passenger about where they were headed and from where they were coming.[97] The individuals gave differing accounts of their point of origin, and the driver could not produce a valid driver's license.[98] Shortly thereafter, the trooper was informed by the police barracks that the operator's driver's license had been suspended, and the driver was placed under arrest.[99] Graham, the passenger of the vehicle, waited approximately twenty-five minutes until the K-9 unit arrived.[100] The drug-sniffing dog subsequently detected the presence of narcotics in the car.[101] When Graham was searched, approximately fifty vials of cocaine were found on his person.[102]

Using the test formulated in *Lemmon* and *Chesternut*, the court analyzed whether in view of the totality of the circumstances, a reasonable person would have believed that he was free to leave in Graham's predicament.[103] The court found that a reasonable person would not have felt free to leave given the circumstances surrounding Graham's detention, and that where a stop lasts for longer than a minimal period of time, there must be a reasonable, articulable suspicion to justify its prolonged nature.[104] In addition, the majority held that the initial purpose of the traffic stop ended upon the arrest of the driver, and the second stop and search of the car was not justified by reasonable, articulable suspicion.[105]

In *Pryor v. State*,[106] the Court of Special Appeals once again held that a twenty-five-minute roadside detention while waiting for a drug-sniffing dog was unreasonable and violated the defendant's Fourth Amendment rights.[107] The court stated that an automobile stop for a minor traffic violation should take no longer than reasonably necessary to issue a citation for the violation committed.[108]

As illustrated, prior to *Ferris*, the Maryland courts had held police to the United States Supreme Court's test formulated in *Chesternut*

97. *See id.* at 448, 705 A.2d at 84.
98. *See id.*
99. *See id.* at 448-49, 705 A.2d at 84.
100. *See id.* at 449, 705 A.2d at 84.
101. *See id.*
102. *See id.*
103. *Id.* at 451, 705 A.2d at 86.
104. *Id.* at 467-68, 705 A.2d at 94. The court further held that where there was evidence that an officer did not as diligently proceed with an investigation at the scene of a traffic stop as he could have, the prolonged detention "will be viewed as unreasonable." *Id.*
105. *See id.*
106. 122 Md. App. 671, 716 A.2d 338 (1998).
107. *Id.* at 678, 716 A.2d at 342.
108. *Id.* at 674-75, 716 A.2d at 340.

and articulated by the Court of Appeals in *Lemmon.* Specifically, if, in view of the totality of the circumstances, a reasonable person would not have felt free to leave, then that individual would be seized within the meaning of the Fourth Amendment.[109] Maryland courts continued to adhere to this standard despite the Supreme Court's narrowing of the rule in *Hodari D.*[110]

b. The United States Supreme Court on Consent.—The *Ferris* court considered a second question relating to the legality of the seizure under the Fourth Amendment—whether Ferris's willingness to cooperate with police in answering questions regarding alleged drug use constituted consent.[111] If valid consent was given to the prolonged detention, the Fourth Amendment would not be implicated, and the evidence challenged by Ferris would be admissible.[112]

The Supreme Court has examined issues of consent with regard to the Fourth Amendment extensively. In *Schneckloth v. Bustamonte,*[113] the Court analyzed the constitutionality of a search of an automobile based on the purported consent of the car's driver.[114] In *Schneckloth,* Police Officer James Rand stopped a car because one of its headlights was not functioning and one tag light was out.[115] Six men were in the vehicle and only one individual, a passenger, could produce identification.[116] The passenger, Joe Alcala, stated that the car belonged to his brother.[117] Officer Rand asked whether he could search the car, and Alcala replied, "Sure, go ahead."[118] Witnesses testified that Alcala actually assisted the officer in conducting the search of the car, opening the trunk and the glove compartment.[119] During the search, Officer Rand found three stolen checks.[120]

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109. *See* State v. Lemmon, 318 Md. 365, 374-75, 568 A.2d 48, 53-54 (1989) (articulating the test for determining whether a seizure had occurred).

110. *See supra* notes 53-58 and accompanying text (summarizing the United States Supreme Court's holding in *Hodari D.*).

111. *See Ferris,* 355 Md. at 363-64, 735 A.2d at 494-95. The court in *Ferris* noted that "the trooper testified: 'I just asked him if he would mind stepping to the back of his vehicle to answer a couple of questions. He stated he didn't mind.'" *Id.* at 363, 735 A.2d at 494.

112. *See id.* at 373-74, 735 A.2d at 500 (stating that if the meeting between Trooper Smith and Mr. Ferris was a "consensual encounter," there would be no constitutional question).

113. 412 U.S. 218 (1973).

114. *Id.* at 219.

115. *Id.* at 220.

116. *See id.*

117. *See id.*

118. *Id.*

119. *See id.*

120. *See id.*

Faced with criminal prosecution, the defense argued that the police had an obligation to inform Alcala that he had the right to refuse to consent to the search of his car, in addition to the state's obligation of showing that the consent had been uncoerced.[121] The Court ruled:

> While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative.[122]

Justice Stewart, writing for the majority, further stated that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent."[123] Thus, for there to be a valid consent, there is no prerequisite that an individual be informed of his right to refuse consent to a search.[124] The Court held that the question of whether consent was given voluntarily or as a result of duress or coercion would be determined by examining the totality of all of the circumstances surrounding the search.[125]

The Court further held that absent duress or coercion, an individual need not explicitly waive his Fourth Amendment rights to have given consent voluntarily.[126] Therefore, it would not require the recitation of warnings such as those given in accordance with *Miranda v. Arizona*.[127] Finally, the Court addressed noncustodial questioning

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121. *See id.* at 221-22.

122. *Id.* at 227.

123. *Id.*

124. *See id.* at 234 (arguing that "[i]mplicit in all of these cases is the recognition that knowledge of a right to refuse is not a prerequisite of a voluntary consent").

125. *See id.* at 227.

126. *See id.* at 241-43. The Court explained:

> There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

127. *Miranda* requires that before a law enforcement officer can engage in a custodial interrogation, he must inform an individual of four rights: (1) the right to remain silent, (2) that anything he said can and will be used against him in court, (3) the right to counsel, and (4) if he could not afford counsel, an attorney would be provided by the court free of charge. Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). Even in light of the *Miranda* requirements, the *Schneckloth* Court would not require an officer to inform an individual of his right to refuse to consent to a search, pointing out that while coercion may be inherent in a custodial interrogation, "there is no likelihood of unreliability or coercion present in a search-and-seizure case." *Schneckloth*, 412 U.S. at 242 (internal quotation marks omitted) (quoting Linkletter v. Walker, 381 U.S. 618, 638 (1965)).

akin to that present in *Ferris*, stating that "*Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analogous to the situation of a consent search, and it assuredly did not indicate that such questioning ought to be deemed inherently coercive."[128]

Over two decades later, the Court, in *Ohio v. Robinette*,[129] reaffirmed its commitment to the principle that law enforcement officers need not inform an individual that he is "free to go" before his consent to a search will be viewed as voluntary.[130] In *Robinette*, the Court held that consent to search must be voluntary and that the test for voluntariness arises from an examination of the totality of the circumstances.[131] Through this approach, Chief Justice Rehnquist wrote that reasonableness may be determined by objective means.[132]

The ability to leave freely or be "free to go" is an essential factor in determining whether an encounter with police is a seizure.[133] Thus, while the Fourth Amendment applies to all seizures "of the person," including those that involve only a "brief detention short of traditional arrest,"[134] mere police questioning does not constitute a seizure.[135] As the Court stated in *Florida v. Royer*, "[s]o long as a reasonable person would feel free 'to disregard the police and go about his business,'" the encounter would be considered consensual and no reasonable suspicion would be required.[136]

3. The Court's Reasoning.—In *Ferris v. State*, the Court of Appeals addressed the question of "whether an operator of a motor vehicle is seized within the meaning of the Fourth Amendment when he is asked to get out of his car for questioning after a traffic stop is completed."[137] The court's analysis consisted of three fundamental questions: (1) Did the traffic stop end when the officer returned Ferris's driver's license and registration, thus making the continued detention a "second stop"; (2) If Ferris was seized, did he consent to the seizure;

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128. *Schneckloth*, 412 U.S. at 247.

129. 519 U.S. 33 (1996).

130. *Id.* at 35.

131. *Id.* at 39-40.

132. *See id.*

133. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 434 (1991) (holding that consent existed where an individual felt "free to go").

134. U.S. v. Mendenhall, 446 U.S. 544, 551 (1980).

135. *Bostick*, 501 U.S. at 434.

136. *Id.* (quoting California v. Hodari D., 499 U.S. 621, 628 (1991)).

137. *Ferris*, 355 Md. at 368, 735 A.2d at 497.

and (3) If Ferris was seized, and there was no consent, did the officer have reasonable, articulable suspicion to justify the seizure.[138]

a. The Trooper's Questioning Constituted a "Second Stop."—Judge Raker began by addressing whether Ferris's entire detention constituted a "single, continuous stop," or two separate stops, the first consisting of the detention related to the traffic violation, and a second stop that began after he had been issued a citation arising from the traffic violation.[139]

After reviewing the Court of Special Appeals's decisions in *Snow v. State*, *Munafo v. State*, and *Pryor v. State*, the majority concluded that once the initial purpose of the traffic stop had been fulfilled, in this case with the issuance of the citation, "the continued detention of the car and its occupants amounts to a second detention" which is "constitutionally permissible only if either (1) the driver consents to the continuing intrusion or (2) the officer has, at a minimum, a reasonable articulable suspicion that criminal activity is afoot."[140] The court concluded that the initial traffic stop ended when Ferris received his citation, driver's license, and registration, and at that point, he was "lawfully free to drive away."[141]

b. Mr. Ferris Did Not Consent to the Trooper's Questioning.—The court began its analysis of the consent issue by recognizing that the mere act of a police officer questioning an individual does not constitute a seizure under the Fourth Amendment.[142] The court explained that "even when [police] officers have no basis for suspecting criminal involvement, they may generally ask questions of an individual 'so long as the police do not convey a message that compliance with their request is required.'"[143] The court then stated that it would judge whether the officer's questioning was consensual using the *Mendenhall* test: the encounter was consensual if a "reasonable person would have felt free to leave."[144] A seizure may occur, according to the court, through physical force or by a show of authority, combined with submission to that authority.[145] In making this determination, the

138. *See id.* at 368, 373, 384, 735 A.2d at 497, 500, 506.

139. *Id.* at 369-70, 735 A.2d at 498.

140. *Id.* at 372, 735 A.2d at 499 (citing United States v. Sandoval, 29 F.3d 537, 540 (10th Cir. 1994)).

141. *Id.* at 373, 735 A.2d at 500.

142. *Id.* at 374-75, 735 A.2d at 500-01 (citing Florida v. Bostick, 501 U.S. 429, 434 (1991); Florida v. Royer, 460 U.S. 491, 498 (1983)).

143. *Id.* at 375, 735 A.2d at 501 (quoting *Bostick*, 501 U.S. at 434-35).

144. *Id.* (citing United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

145. *See id.* (citing California v. Hodari D., 499 U.S. at 625-26).

court stated that it would apply the totality of the circumstances test "with no single factor dictating whether a seizure has occurred."[146]

The court concluded that, given the factors surrounding the traffic stop in *Ferris* and the cumulative effect such factors had on the totality of the circumstances, a reasonable person in Ferris's position would not have believed that he was free to terminate the encounter with Trooper Smith.[147] In reaching this conclusion, the court noted that there was a pre-existing coercive atmosphere that carried over from the "previous stop" for speeding and that the officer failed to inform Ferris that he was free to leave after receiving his citation.[148] Additionally, the court explained that because "there were two uniformed officers present, the police cruiser emergency flashers remained operative throughout the entire encounter, and it was 1:30 a.m. on a dark, rural interstate highway," the coercive effect of the stop was heightened.[149] Given the totality of the circumstances, the court held, Ferris did not consent to be questioned by Trooper Smith.[150]

c. The Trooper Did Not Have Reasonable Suspicion to Begin the Second Stop.—Having concluded that Ferris was seized for purposes of the Fourth Amendment when Trooper Smith asked him to step to the back of his car and that he did not consent to this second stop, the *Ferris* court proceeded to determine whether there was reasonable suspicion for Trooper Smith to begin the second stop after issuing the citation.[151] The court began by stating that the test for determining the existence of reasonable suspicion was "whether a reasonably pru-

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146. *Id.* at 376, 735 A.2d at 501 (citing *Bostick*, 501 U.S. at 437; *Mendenhall*, 446 U.S. at 554).

147. *Id.* at 377, 735 A.2d at 502. Factors considered by the court included:

> the time and place of the encounter, the number of officers present and whether they were uniformed, whether the police removed the person to a different location or isolated him or her from others, whether the person was informed that he or she was free to leave, whether the police indicated that the person was suspected of a crime, whether the police retained the person's documents, and whether the police exhibited threatening behavior or physical contact that would suggest to a reasonable person that he or she was not free to leave.

Id.

148. *Id.* at 378, 735 A.2d at 502.

149. *Id.* at 378-79, 735 A.2d at 503. The court gave five distinct reasons for finding that there was no consent in this case: (1) the pre-existing seizure for speeding enhanced the coercive nature of the second stop; (2) Ferris was never informed of his right to refuse to answer Trooper Smith's questions; (3) Ferris was moved to the rear of his car, thus creating a more coercive environment; (4) two uniformed officers were present; and (5) the encounter occurred late at night on a rural highway. *See id.* at 378-84, 735 A.2d at 502-06.

150. *See id.* at 384, 735 A.2d at 506.

151. *Id.*

dent person in the officer's position would have been warranted in believing that Ferris was involved in criminal activity that was afoot."[152] Once again, the court announced that it would examine the totality of the circumstances to determine whether reasonable suspicion existed.[153] In its argument, the state used the following four factors to justify its reasonable suspicion: (1) that Ferris's eyes were bloodshot; (2) that there was no smell of alcohol in the car; (3) Ferris appeared to be nervous; and (4) that Ferris and Mr. Discher, the passenger, were moving around and frequently looking back toward Trooper Smith's patrol car.[154]

The court also stated that for reasonable suspicion to exist, the factors contributing to the suspicion must "eliminate a substantial portion of innocent travelers."[155] In other words, when considered together, the four factors Trooper Smith cited as justification for Ferris's questioning must be a set of characteristics that, more often than not, will describe a situation in which criminal activity has taken place or will take place.[156] In applying this principle, the court concluded that the facts surrounding the traffic stop in *Ferris* did not meet the level of suspicion necessary to justify further detention of Ferris.[157] The court explained that "[i]n the early morning hours, these factors could fit 'a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the court to conclude that as little foundation as there was in this case could justify a seizure.'"[158] The court therefore held that Ferris had been seized without reasonable, articulable suspicion, in violation of his Fourth Amendment rights.[159]

Judge Chasanow filed a dissenting opinion, in which Judge Rodowsky joined, arguing that Ferris's answers to Trooper Smith's

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152. *Id.* (citing Derricott v. State, 327 Md. 582, 588, 611 A.2d 592, 595 (1992); Graham v. State, 325 Md. 398, 407, 601 A.2d 131, 135 (1992); State v. Lemmon, 318 Md. 365, 376, 568 A.2d 48, 52 (1990)).

153. *Id.* (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

154. *See id.* at 385, 735 A.2d at 506-07.

155. *Id.* at 387, 735 A.2d at 507 (quoting Karnes v. Skrotski, 62 F.3d 485, 493 (3d Cir. 1995)).

156. *See id.*

157. *Id.* at 387, 735 A.2d at 507-08.

158. *Id.* at 387, 735 A.2d at 508 (quoting Reid v. Georgia, 448 U.S. 438, 441 (1980)). The court concluded that bloodshot eyes could merely be indicative of a tired traveler. *Id.* at 387-93, 735 A.2d at 508-11. The court also reasoned that nervousness, fidgetiness, and the fact that Ferris and Discher turned to look at the patrol car on several occasions could be natural reactions to being stopped by a law enforcement officer, according to the court. *Id.* Similarly, the court would not accept the use of a *lack* of alcohol smell as justification for suspicion. *Id.*

159. *See id.* at 393, 735 A.2d at 511.

questions were freely and voluntarily given.[160] Judge Chasanow further maintained that an appellate court should not have made a factual determination regarding consent contrary to that made by the trial judge.[161] Judge Chasanow stated that when Trooper Smith issued the citation and returned Ferris's license and registration, the suspect was free to leave, yet voluntarily answered the trooper's questions.[162]

4. Analysis.—The Court of Appeals's holding that Ferris was seized for purposes of the Fourth Amendment was a predictable result given Maryland's history of subjecting police officers to a high level of scrutiny when deciding Fourth Amendment issues.[163] The Court of Appeals, however, appears to be out of step with recent United States Supreme Court decisions clearly defining what constitutes consent and allowing law enforcement greater latitude during questioning of suspects during traffic stops.[164]

a. "Second Stops"—The Ferris *Court's Adherence to Precedent.*—The *Ferris* court's conclusion that a second stop began when Trooper Smith returned Ferris's driver's license and registration and then asked him whether he would mind stepping out of the car is consistent with prior Maryland cases involving traffic stops.[165] In *Munafo v. State*, the Court of Special Appeals held that once the purpose for an initial traffic stop has been fulfilled, any further detention will be considered a "second stop," required to be justified by a separate reasonable, articulable suspicion.[166]

Similarly, in *Snow v. State*, the Court of Special Appeals found that when an officer issued a written warning to a driver, the initial purpose of the stop had been fulfilled.[167] Therefore, the constitutional focus would lie on the subsequent detention of the individual, what

160. *Id.* at 395, 735 A.2d at 512 (Chasanow, J., dissenting).

161. *Id.* at 394, 735 A.2d at 511 (arguing that the lower court should have deferred to the trial court's factual findings).

162. *Id.* at 394-95, 735 A.2d at 511-12.

163. *See supra* notes 70-83, 84-108 and accompanying text (analyzing recent Maryland case law concerning traffic stops and related Fourth Amendment rights).

164. *See supra* notes 113-136 and accompanying text (analyzing United States Supreme Court jurisprudence with regard to consent issues).

165. *See* Munafo v. State, 105 Md. App. 662, 673, 660 A.2d 1068, 1073 (1995) (holding that a second stop occurred when officers began a second line of questioning of a driver after they had already issued a traffic warning).

166. *Id.* at 673, 660 A.2d at 1073; *see also supra* notes 85-89 and accompanying text (discussing the court's holding in *Munafo*).

167. 84 Md. App. 243, 248, 578 A.2d 816, 818 (1990) (noting the sequence of events in the traffic stop).

the *Munafo* court called the "second stop."[168] While the term "second stop" frequently appears in Maryland Fourth Amendment jurisprudence involving traffic stops, United States Supreme Court decisions are void of any reference to the concept of a second stop.

b. The Encounter Between Ferris and the Trooper was Consensual.—The *Ferris* court's analysis with regard to whether Ferris had given consent to be questioned by Trooper Smith departs significantly from the Supreme Court's reasoning on the issue of consent. Even though Ferris stated that "he didn't mind" stepping aside for further questioning,[169] the Court of Appeals nevertheless held that because a reasonable person in Ferris's position would not have felt free to terminate the encounter, Ferris had not consented to the questioning.[170] In so concluding, the court looked to the coercive nature of the traffic stop, including the presence of two uniformed officers and two patrol cars with emergency lights on, the removal of Ferris to another location (behind his car), and the failure of Trooper Smith to inform Ferris that he was free to leave.[171]

In contrast, in *Schneckloth v. Bustamonte*,[172] the United States Supreme Court firmly held that where an officer of the law seeks an individual's consent to conduct a search or seizure, the warrant clause of the Fourth Amendment is inapplicable; rather, the test is whether the search was reasonable under the circumstances.[173] Justice Stewart called a consent search "directly analogous" to investigative questioning of an individual outside of police custody, precisely the situation present in *Ferris*.[174] The Court went on to state clearly that the government need not, under any circumstances, inform an individual of a

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168. *Id.*

169. *Ferris*, 355 Md. at 363, 735 A.2d at 494.

170. *Id.* at 377-78, 735 A.2d at 502.

171. *See id.* at 378, 735 A.2d at 502-03. The court stated:

> We find significant the following circumstances: the trooper never told Ferris he was free to leave, . . . the trooper removed Ferris from his automobile, . . . there were two uniformed law enforcement officers present, the police cruiser emergency flashers remained operative throughout the entire encounter, and it was 1:30 a.m. on a dark, rural interstate highway.

172. 412 U.S. 218 (1973).

173. *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 350 (5th ed. 1996) ("[W]hen the warrant clause is inapplicable, the basic test is reasonableness under the circumstances. And a search pursuant to voluntary consent is reasonable." (footnote omitted)); *supra* notes 113-128 and accompanying text (discussing the Court's holding in *Schneckloth* with respect to consent).

174. *See Schneckloth*, 412 U.S. at 247.

right to refuse consent to such a search or questioning.[175] A lack of knowledge of this right may be a factor to be taken into account when examining the totality of the circumstances; however, it is by no means dispositive.[176]

The *Ferris* court acknowledged that police are not required to inform citizens of their right to refuse consent or their right to leave before consenting.[177] The court emphasized, however, that the right to refuse consent is "one factor to be taken into account."[178] The court, while admitting that Trooper Smith's failure to inform Ferris of his right to leave was not dispositive, continued to refer to the omission as a "significant factor," noting that "few motorists would feel free . . . to leave the scene of a traffic stop without being told they might do so."[179] Based on the court's emphasis on informed consent, it is hard to imagine a situation where consent would be considered voluntary without an officer informing the individual that he was free to leave or refuse consent. This type of deterrent to voluntary cooperation with the police is exactly what the Supreme Court was attempting to avoid in *Schneckloth*.[180]

In *Schneckloth*, an individual was asked by an officer whether he could search the interior of his car and the individual agreed.[181] Similarly, in *Ohio v. Robinette*,[182] an individual consented to a search of his automobile, which turned up a small quantity of marijuana and methamphetamines.[183] In both instances, the initial purpose of the traffic stop was separate and distinct from the officer's reasoning for the search and additional questioning, and in both cases, the Su-

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175. *Id.* at 227 (stating that although "knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as 'sine qua non' of an effective consent").

176. *See id.* at 249 (noting the accused's state of mind is a factor to be considered, but is not determinative).

177. *Ferris*, 355 Md. at 379, 735 A.2d at 503 ("We recognize that the police are not required to inform citizens that they are free to leave before getting consent to search a motor vehicle.").

178. *Id.* at 380, 735 A.2d at 503 (internal quotation marks omitted) (quoting Ohio v. Robinette, 519 U.S. 33, 38 (1996)).

179. *Id.* at 381, 735 A.2d at 504 (alteration in original) (internal quotation marks omitted) (quoting Berkemer v. McCarty, 468 U.S. 420, 436 (1984)).

180. *See Schneckloth*, 412 U.S. at 243 ("[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.").

181. *Id.* at 220.

182. 519 U.S. 33 (1996).

183. *Id.* at 36.

preme Court upheld the defendant's voluntary consent.[184] In light of the Supreme Court's decisions in *Schneckloth* and *Robinette*, which upheld as valid consent a physical invasion of one's possessions, suppression by the Supreme Court of similar consent involving mere questioning of the driver of the car, as in *Ferris*, would seem unlikely.

The validity of this contention, however, depends on whether Ferris was seized within the meaning of the Fourth Amendment. The court in *Ferris* stated that "if a reasonable person would have felt free to leave, no seizure occurred. Conversely, if a reasonable person would have felt compelled to stay, a seizure took place."[185] The court then cited several factors, including the time and place of the stop, the officer's intimidating presence, and the failure to inform Ferris of his right to refuse consent, as contributing to the totality of the circumstances.[186] These circumstances combined, the court held, would have led a reasonable person to believe that he was not free to leave, therefore Mr. Ferris was seized in violation of his Fourth Amendment rights.[187] Thus, in *Ferris*, the defendant could not consent because he was not free to leave.[188]

While the Court of Appeals may have reached a favorable result with regard to individual civil liberty, its decision appears to run contrary to several United States Supreme Court opinions.

In *United States v. Mendenhall*,[189] an individual was approached in the Detroit Metropolitan Airport under suspicion of trafficking narcotics.[190] She was asked to present her identification and airline ticket.[191] After questioning the individual, the Drug Enforcement Agency officers handed back her documents and proceeded to ask Mendenhall whether she would accompany the agents to the airport DEA office.[192] Mendenhall agreed to follow the agents back to their office and allowed them to search her person and her handbag, al-

184. *Id.* (explaining that the initial purpose of the traffic stop was for speeding); *see Schneckloth*, 412 U.S. at 220 (stating that the initial purpose of the traffic stop was for an inoperative headlight and license plate light).

185. *Ferris*, 355 Md. at 375, 735 A.2d at 501.

186. *See id.* at 377, 735 A.2d at 502 (discussing the factors leading to the conclusion that Mr. Ferris was seized).

187. *See id.* at 384, 735 A.2d at 506 (holding that the totality of the circumstances was a "show of authority" such that a reasonable person would not have felt free to terminate the encounter).

188. *Id.*

189. 446 U.S. 544 (1980).

190. *Id.* at 547-48.

191. *See id.*

192. *See id.* at 548.

though she was advised that she could decline the search if she so pleased.[193]

In *Mendenhall*, the Court held that in spite of all the circumstances, a reasonable person in Mendenhall's position would have felt free to "end the conversation . . . and proceed on her way."[194] Therefore, no seizure of Mendenhall occurred despite the agents' questioning and search.[195] Mendenhall's cooperation, the Court held, was completely voluntary.[196] The Court stated that it "would adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained."[197] According to the Court, nothing in the Constitution "prevents a policeman from addressing questions to anyone on the streets."[198]

Similarly, in *Florida v. Royer*,[199] the Court held that an individual had been seized when he was stopped in an airport and questioned while the officers retained possession of his driver's license and airline ticket.[200] In *Royer*, the suspect was escorted to the DEA office in the same manner as Mendenhall. In this case, however, the agents did not return Royer's personal effects.[201] Consequently, the Court held, a reasonable person in Royer's position would not have felt free to leave.[202]

Given the Supreme Court's holdings in Mendenhall and Royer, it becomes clear that the Supreme Court very likely would have decided *Ferris* differently than did the Court of Appeals. Presented with a situation wherein an individual was detained and issued a speeding ticket, and then returned his driver's license and registration by the officers, the Supreme Court would find that Ferris was free to leave after receiving his personal effects.[203] Once the initial stop had ended with the return of Ferris's belongings, Ferris was free to leave in accor-

193. *See id.* at 548-49. It should be noted, however, that the Supreme Court recently held that the Fourth Amendment does not require that a defendant be advised that he is "free to go" before consent to search is deemed voluntary. Ohio v. Robinette, 519 U.S. 33, 35 (1996).

194. *Mendenhall*, 446 U.S. at 555.

195. *Id.*

196. *Id.* at 557-58.

197. *Id.* at 554.

198. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 34 (1968)).

199. 460 U.S. 491 (1983).

200. *Id.* at 501.

201. *Id.*

202. *Id.* at 502.

203. *See Ferris*, 355 Md. at 394, 735 A.2d at 511 (Chasanow, J., dissenting) (stating that the officer's requests to step behind the vehicle was made after the citation was signed and Ferris's license and registration were returned, and therefore, Ferris's answers to the officer's questions were "freely and voluntarily given").

dance with the Supreme Court's analysis in *Mendenhall* and *Royer*. Ferris's cooperation thereafter was governed by the law of consent as set forth by the Court in *Schneckloth v. Bustamonte*.[204]

It could be argued, however, that the flashing lights of the officer's patrol car in *Ferris* constituted a show of authority to which Ferris submitted, thereby resulting in a second seizure.[205] Such a contention, however, would not seem to be bolstered by the Court's holding in *California v. Hodari D.*[206] In *Hodari D.*, the Supreme Court held that only where there is physical force on the part of law enforcement or "submission to the assertion of authority" can a seizure take place for purposes of a Fourth Amendment analysis.[207] In narrowing the *Mendenhall* and *Lemmon* "reasonable person" test, Justice Scalia clearly stated, in the majority opinion, that even where all the circumstances surrounding the incident would lead a reasonable person to believe that he was not free to leave, it does not necessarily follow that there has been a seizure.[208] This contradicts the court's holding in *Ferris* that "if a reasonable person would have felt compelled to stay, a seizure took place."[209] The only remaining question with regard to the validity or consent based on a Supreme Court analysis was whether the show of authority by the police in *Ferris* constituted an unreasonable seizure, and if so, whether Mr. Ferris submitted to the assertion of authority.

In *Hodari D.*, the Court plainly stated that the word "seizure" does not "remotely apply . . . to the prospect of a policeman yelling, 'Stop, in the name of the law!' at a fleeing form . . . ."[210] The Court cautioned that "[m]ere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential . . . . There can be no arrest without either touching or submission [to a show of authority]."[211] Since there is no physical seizure in *Ferris*, it is necessary

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204. 412 U.S. 218 (1973).

205. *See Mendenhall*, 446 U.S. at 553 (holding that a person is seized only when his freedom of movement is restrained by physical force or when he submits to a show of authority).

206. 499 U.S. 621 (1991).

207. *Id.* at 626; *see supra* notes 53-58 and accompanying text (discussing the Court's holding in *Hodari D.*).

208. *Hodari D.*, 499 U.S. at 628. The Court stated:

> In seeking to rely upon that test here, respondent fails to read it carefully. It says that a person has been seized 'only if,' not that he has been seized 'whenever'; it states a necessary, but not a sufficient, condition for seizure—or, more precisely, for seizure effected through a 'show of authority.'

Id.

209. *Ferris*, 355 Md. at 375, 735 A.2d at 501.

210. *Hodari D.*, 499 U.S. at 626.

211. *Id.* at 626-27 (quoting Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940)).

to address the possibility that the officer's questioning amounted to a show of authority. In the *Hodari D.* case, the Court would not find a seizure where an individual was chased by police on foot and ordered to "halt."[212] The seizure in *Hodari D.* only occurred when the suspect was tackled by police.[213]

Given the Supreme Court's hesitance to label an individual "seized" even while being pursued or questioned by police, it is very difficult to see how, by merely asking a person if he would mind stepping to the back of his vehicle, Trooper Smith seized Ferris. Because there was no show of authority on the part of Trooper Smith, his questioning did not constitute a seizure, and Ferris's responses to his questions were purely conversational. Even if a reasonable person in Ferris's position would not have felt free to leave, under *Mendenhall* and *Hodari D.*, the Supreme Court would not likely find that Ferris submitted to an assertion of authority by Trooper Smith constituting an unreasonable seizure under the Fourth Amendment.

c. Reasonable Suspicion and the Purported Second Stop.—If the court were to find that Ferris had given consent because he was not seized within the meaning of the Fourth Amendment, whether or not there was reasonable, articulable suspicion to begin the "second stop" would be a moot issue. The *Ferris* court's finding that Trooper Smith did not have reasonable, articulable suspicion to stop Ferris, however, is consistent with past Maryland case law.[214]

In *Snow v. State*, the Court of Special Appeals stated that oftentimes several innocent-appearing characteristics of an individual, when taken together, may have "special significance" in determining whether there is reasonable suspicion.[215] The *Snow* court held that nervousness, being a "highly subjective observation," could not justify the officer's suspicion, as many completely innocent individuals be-

212. *Id.* at 629.

213. *Id.*

214. *See* Snow v. State, 84 Md. App. 243, 260, 578 A.2d 816, 824 (1990) (holding that lack of eye contact with the trooper, travel on an interstate highway, and air fresheners did not give reasonable suspicion); Munafo v. State, 105 Md. App. 662, 676, 660 A.2d 1068, 1074-75 (1995) (holding that a prior arrest record and the fact that Munafo seemed to be hiding something did not give the trooper reasonable suspicion); State v. Lemmon, 318 Md. 365, 379-80, 568 A.2d 48, 56 (1990) (holding that two men talking to each other on a street corner was not enough to form the basis for reasonable suspicion); Derricott v. State, 327 Md. 582, 592, 611 A.2d 592, 597 (1992) (holding that the use of a drug courier profile alone could not form the basis for reasonable suspicion).

215. 84 Md. App. 243, 255, 578 A.2d 816, 822 (1990) (citing Derricott v. State, 84 Md. App. 192, 578 A.2d 791 (1990), *rev'd*, 327 Md. 582, 611 A.2d 592 (1992)).

come nervous when confronted by a police officer.[216] Similarly, in *Ferris*, the Court of Appeals concluded that an individual's nervous behavior did not constitute reasonable suspicion that criminal activity was afoot.[217] The court further found that Ferris's nervousness combined with his bloodshot eyes still did not constitute a reasonable, articulable suspicion of criminal activity, as bloodshot eyes may be a mere sign of tiredness in a late-night driver.[218]

In *United States v. Sokolow*,[219] the United States Supreme Court required that for an officer to make a stop on the basis of reasonable suspicion, the officer must have more than a mere "hunch," but something less than probable cause to make the stop.[220] Chief Justice Rehnquist, writing for the majority, stated that "the concept of reasonable suspicion . . . is not 'readily, or even usefully, reduced to a neat set of legal rules.'"[221] The Court further explained that "innocent behavior will frequently provide the basis for a showing of probable cause," and in making that determination, it is necessary to address the "degree of suspicion that attaches to particular types of noncriminal acts."[222] In rejecting a bright-line test for reasonable suspicion and providing little guidance as to what factors constitute reasonable suspicion, the Supreme Court left the determination of whether there was sufficient suspicion to the lower courts. Therefore, the Court of Appeals was well within its discretion to determine that there was not reasonable, articulable suspicion to question the driver in *Ferris*.

5. Conclusion.—In *Ferris v. State*, the Court of Appeals confronted several questions of criminal procedure, including whether a second stop had occurred after a citation had been issued to a driver, whether the driver had given consent to be questioned by the officer about the possibility of drug use, and whether the officer had reasonable suspicion to question the individual.[223] All of these component questions serve to answer the question: Was Ferris seized within the meaning of the Fourth Amendment when he was asked to step out of his car for questioning after he had been given his citation?[224] While the Court of Appeals answered "yes" to the question presented, recent

216. *Id.*
217. *Ferris*, 355 Md. at 387-89, 735 A.2d at 508-09.
218. *See id.* at 391, 735 A.2d at 510.
219. 490 U.S. 1 (1989).
220. *Id.* at 7.
221. *Id.* (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).
222. *Id.* at 9-10 (quoting *Gates*, 462 U.S. at 243-44).
223. *Ferris*, 355 Md. at 368-93, 735 A.2d at 497-511.
224. *Id.* at 368, 735 A.2d at 497.

United States Supreme Court decisions provide a basis for an argument to the contrary. The Supreme Court's holdings in *California v. Hodari D.* and in *United States v. Mendenhall* that a seizure has not occurred absent physical force or a submission to an assertion of authority, combined with the fact that the officer had returned Ferris's license and registration runs contrary to the Court of Appeals' ultimate conclusion that Mr. Ferris was seized when he was merely asked to step out of his car. Additionally, when analyzed in light of *Schneckloth v. Bustamonte* and *Ohio v. Robinette,* it would appear that there was no show of authority on the part of the police officer in *Ferris* to negate the individual's voluntary agreement to answer the trooper's questions. However, *Ferris* stands as the current case precedent for traffic stop seizure in the State of Maryland. Therefore, it remains likely that lower courts will carefully scrutinize any attempt by a police officer to continue a traffic stop after an officer has issued a citation or warning, whether or not there has been apparent consent to the questioning on the part of the suspect.

MATTHEW J. MESMER

B. Narrowing the Required Litany of Advice for a Defendant's Jury Trial Waiver

In *State v. Bell*,[1] the Court of Appeals examined whether Maryland Rule 4-246(b)[2] requires a specific in-court litany of advice with respect to jury unanimity as a prerequisite for a defendant's waiver of a jury trial.[3] The court held that Rule 4-246(b) does not require a specific litany of advice regarding unanimity.[4] In reaching this conclusion, the court analyzed the plain meaning of the rule's language, its legislative history, and relevant case law.[5] The reasoning employed by the court in determining that Rule 4-246(b) does not require such a litany is sound, and its decision in *Bell* is an appropriate interpretation of the Rule's requirements. While the *Bell* court did reach the correct decision, it did not however, address adequately the possible negative ramifications of its holding. The court's determination that a defendant need not be advised of the jury unanimity requirement eliminates a very important assurance that the defendant will have knowledge of a critical aspect of his or her constitutional right to a jury trial.

1. The Case.—On September 2, 1994, Wilbur Bell was arrested on charges of second degree rape, attempted rape, assault with intent to rape, and assault and battery.[6] Bell initially filed a demand for a jury trial.[7] By the time the case was called for trial, however, Bell had changed his mind.[8] His attorney informed the court that Bell decided

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1. 351 Md. 709, 720 A.2d 311 (1998).

2. Rule 2-246(b) provides that

> [a] defendant may waive the right to a trial by jury at any time before the commencement of trial. The court may not accept the waiver until it determines, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that the waiver is made knowingly and voluntarily.

MD. RULE 4-246(b).

3. 351 Md. at 717-20, 720 A.2d at 315-16.

4. *Id.* at 730, 720 A.2d at 321 (stating that "[t]he rule no longer requires a specific in-court litany of advice with respect to the 'unanimity' requirement for the trial court to accept and permit the waiver, by a defendant, of his right to a jury trial" (footnote omitted)).

5. *Id.* at 719-30, 720 A.2d at 317-21.

6. *Id.* at 711-12, 720 A.2d at 312-13. The respondent, Wilbur Bell, was charged as the result of an attack on Ms. Pamela Collins. *See* Bell v. State, 118 Md. App. 64, 70-71, 701 A.2d 1183, 1186 (1997). During the attack the respondent choked, threatened and eventually raped Ms. Collins. *See id.*

7. *See Bell*, 351 Md. at 712, 720 A.2d at 313 (noting that on November 14, 1994, Bell filed a demand for a jury trial).

8. *See id.*

"to waive a jury trial and go with a Court trial."[9] The judge responded by asking defense counsel whether he had "advised Mr. Bell of the ramifications of [waiving a jury trial]?"[10] Bell's attorney informed the judge that he had discussed the matter with his client.[11] He then repeated it for the record. During this litany, the court specifically asked Bell: "Do you understand if you were to have a jury trial, which would consist of twelve people, or whether you choose to have this member of the bench hear the case, the State would still have the burden to prove the charges against you beyond a reasonable doubt?"[12] Bell answered "Yes."[13]

After Bell voluntarily relinquished his right to a jury trial, a bench trial was conducted.[14] The trial judge convicted Bell of second-degree rape, assault and battery, attempted rape, and assault with intent to rape.[15] Bell was sentenced to twenty years of imprisonment for the second-degree rape conviction, with ten years suspended.[16] The remaining counts were merged with the rape conviction.[17] Bell subsequently appealed his convictions to the Court of Special Appeals.[18]

The Court of Special Appeals addressed whether Bell knowingly and voluntarily waived his right to a jury trial when the trial court failed to advise him that a jury's verdict must be unanimous in order to render a conviction.[19] The court found that he had not knowingly and voluntarily waived the right because Maryland Rule 4-246(b)[20] requires a defendant to be advised that a jury's verdict must be unanimous in order to convict.[21] Because Bell was not advised that a jury's verdict must be unanimous, the court vacated the convictions and remanded the case to the circuit court.[22]

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9. *Id.*
10. *Id.*
11. *Id.* at 713, 720 A.2d at 313.
12. *Id.* at 714, 720 A.2d at 313.
13. *Id.*
14. *Id.* at 711, 720 A.2d at 312.
15. *Id.*
16. *Id.* at 711-12, 720 A.2d at 312.
17. Bell v. State, 118 Md. App. 64, 69, 701 A.2d 1183, 1186 (1997).
18. *Bell*, 351 Md. at 712, 720 A.2d at 312.
19. *Bell v. State*, 118 Md. at 69, 701 A.2d at 1186. The Court of Special Appeals also addressed whether the trial court erred in limiting cross-examination of the prosecutrix, admitting evidence of other crimes committed by the defendant, and restricting cross-examination of a State's witness. *See id.* at 69-70, 701 A.2d at 1186.
20. MD. RULE 4-246(b); *see supra* note 2 (providing text of Rule 4-246(b)).
21. *Bell*, 118 Md. at 81, 701 A.2d at 1191 (contending that while the language of Rule 4-246(b) differs from its predecessor, former Rule 731, the requirements "with respect to unanimity" are the same).
22. *Id.* at 70, 701 A.2d at 1186.

Following the Court of Special Appeals's decision, the State petitioned the Court of Appeals, requesting the court to consider whether the Court of Special Appeals incorrectly held that Rule 4-246(b) requires a defendant to be informed that jury unanimity is necessary to secure a conviction.[23] The Court of Appeals granted certiorari, and reversed the Court of Special Appeals's decision.[24]

2. *Legal Background.*—

a. Maryland Law.—In *State v. Bell*, the Court of Appeals addressed whether, under Rule 4-246(b), a defendant can "knowingly" waive his right to a jury trial without first being advised that a jury's decision must be unanimous before it can convict a defendant.[25] Prior to *Bell*, the court had examined this same issue under the predecessor of Rule 4-246(b), Maryland Rule 735. Rule 735(d) stated, in pertinent part:

> If the defendant elects to be tried by the court, the trial of the case on its merits before the court may not proceed until the court determines, after inquiry of the defendant on the record, that the defendant had made his election for a court trial with full knowledge of his right to a jury trial and that he has knowingly and voluntarily waived the right.[26]

Subsection (b) of the former rule also required that the defendant sign a form acknowledging that he had "a right to be tried by a jury of 12 persons or by the court without a jury" and that all twelve jurors must find the defendant guilty.[27]

The Court of Appeals interpreted Rule 735, before it was amended, in *Countess v. State*.[28] In *Countess*, the court stated that the language in Rule 735, directing a court to verify that a defendant waived his right to a jury trial with "full knowledge" of that right, required a defendant to have "a basic understanding of the nature of a jury trial."[29] The "basic understanding" standard would be satisfied if the defendant knew

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23. *Bell*, 351 Md. at 712, 720 A.2d at 313.

24. *Id.*

25. *Id.* at 717, 720 A.2d at 315. This was the first case decided by the Court of Appeals to specifically address the unanimity requirement as interpreted under Rule 4-246(b). *See id.* (explaining that "since the rule [4-246(b)] was modified in 1981," the court had not yet addressed "whether a defendant can 'knowingly' waive his or her right to a jury trial without a specific reference to the unanimity request").

26. MD. RULE 735(j) (repealed 1984); *see also Bell*, 351 Md. at 715, 720 A.2d at 314 (quoting former Maryland Rule 735(j)).

27. MD. RULE 735(b) (repealed 1984); *see also Bell*, 351 Md. at 716, 720 A.2d at 314.

28. 286 Md. 444, 408 A.2d 1302 (1979).

29. *Id.* at 455, 408 A.2d at 1308.

> that he ha[d] the right to be tried by a jury of 12 persons or by the court without a jury; that whether trial is by a jury or by the court, his guilt must be found to be beyond a reasonable doubt; that in a jury trial all 12 jurors must agree that he is so guilty but in a court trial the judge may find so.[30]

Thus, the *Countess* court concluded that a defendant must be informed of the requirement of juror unanimity for a waiver to be valid.[31]

The *Countess* court reasoned that a waiver under 735(d) "goes no further than the mandates for a waiver of that right under the constitutions."[32] Defense counsel urged, however, that "full knowledge certainly implies understanding of the most salient features of trial by jury, including, at a minimum, the composition of the jury, the jury selection process, and the unanimity requirement."[33] The court rejected this argument, stating that it went "far beyond what is necessary."[34] The court interpreted the "full knowledge" requirement of Rule 735 narrowly by mandating that a defendant must be informed of the number of persons required to sit on a jury, that guilt must be found beyond a reasonable doubt, and that the jury's verdict must be unanimous.[35]

Soon after the *Countess* decision, however, Rule 735 was revised.[36] Revised Rule 735 did not contain the "full knowledge" language or the written waiver requirement.[37] Eventually, Revised Rule 735 was amended and codified as Rule 4-246.[38] Rule 4-246(b) mandates that

> [t]he court may not accept the waiver until it determines, after an examination of the defendant on the record in open court conducted by the court, the State's Attorney, the attorney for the defendant, or any combination thereof, that the waiver is made knowingly and voluntarily.[39]

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30. *Id.*

31. *Id.*

32. *Id.*, 408 A.2d at 1307. The Supreme Court has noted that the Constitution requires that a waiver of the right to a trial by jury must be made knowingly, intelligently, and voluntarily. *See* Patton v. United States, 281 U.S. 276, 311-12 (1930)).

33. *Countess*, 286 Md. at 455, 408 A.2d at 1307.

34. *See id.* (explaining that the criteria proposed to satisfy "full knowledge" went "far beyond what is necessary for a waiver of a jury trial to be constitutionally effective").

35. *Id.*, 408 A.2d at 1308.

36. *See Bell*, 351 Md. at 716, 720 A.2d at 314 (noting that Rule 735 was revised on November 13, 1981, and became effective January 1, 1982).

37. *Id.* (citing 8 Md. Reg. 1928, 1929-30 (1981)).

38. *Cf.* Bell v. State, 118 Md. App. 64, 74, 701 A.2d 1183, 1888 (1997) (noting that Rule 4-246(b) was adopted in 1984).

39. MD. RULE 4-246(b).

While the court first examined the unanimity requirement under Rule 4-246(b) in *Bell*, it had the occasion to analyze other relevant aspects of the rule previously.[40] In *Martinez v. State*[41] the court addressed what constituted a voluntary waiver of the right to a jury trial.[42] To begin its analysis, the Court of Appeals of Maryland cited the Supreme Court's mandates that waivers must be "an intentional relinquishment or abandonment of a known right or privilege"[43] and "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[44] The Court of Appeals further found that a "fixed incantation" need not be recited to a defendant who elects to voluntarily waive his right to a jury trial.[45] The court explained that the "unique facts and circumstances of each case" must be analyzed to determine whether the defendant competently and intelligently waived his right.[46] Additionally, the court noted that the defendant must have "some knowledge of the jury trial before he is allowed to waive it."[47]

The court applied similar guidelines in *State v. Hall*.[48] In *Hall*, the defendant's conviction was upheld even though the trial court failed to advise him of certain details about a jury trial.[49] Specifically, the court failed to ask the defendant if he understood what he had been told relating to jury trials, and whether his waiver of a jury trial was the result of coercion or physical or mental duress.[50] Based on the specific facts of the case, the court found that constitutional due process requirements were met and that the record adequately

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40. *See* Tibbs v. State, 323 Md. 28, 590 A.2d 550 (1991); State v. Hall, 321 Md. 178, 582 A.2d 507 (1990); Martinez v. State, 309 Md. 124, 252 A.2d 950 (1987); *see also supra* notes 41-57 and accompanying text.

41. 309 Md. 124, 522 A.2d 950 (1987).

42. *Id.* at 129, 522 A.2d at 952.

43. *Id.* at 133, 522 A.2d at 955 (internal quotation marks omitted) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

44. *Id.* at 134, 522 A.2d at 955 (internal quotation marks omitted) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

45. *Id.*

46. *Id.* (citing Adams v. United States *ex rel.* McCann, 317 U.S. 269, 278 (1942)).

47. *Id.* (citing *Adams*, 317 U.S. at 280; Harris v. State, 295 Md. 329, 339 n.1, 455 A.2d 979 n.1 (1983); Dortch v. State, 290 Md. 229, 232, 428 A.2d 1220 (1980)).

48. 321 Md. 178, 582 A.2d 507 (1990).

49. *See id.* at 183, 582 A.2d at 510 (finding that the trial court "could fairly be satisfied that Hall had the requisite knowledge of the jury trial right, that the waiver was voluntary, and that the requirements of the rule were satisfied").

50. *Id.* The court did inform the defendant of the number of people on a jury, the reasonable doubt standard of guilt, and that waiver of a trial by jury would result in the court deciding guilt or innocence. *Id.* at 183, 582 A.2d at 509.

demonstrated that the defendant had knowingly and voluntarily waived his right to a jury trial.[51]

The totality of the circumstances test advanced in *Hall* was also applied by the court in *Tibbs v. State*[52] to conclude that the defendant did not knowingly and voluntarily relinquish his right to a jury trial.[53] The *Tibbs* court emphasized that the defendant had not received any of the required information concerning "the nature of a jury trial."[54] Specifically, the court found that "[i]t is not sufficient that an accused merely respond affirmatively to a naked inquiry, either from his lawyer or the court, that he understood that he has a right to a jury trial, that he knows 'what a jury trial is,' and waives that right 'freely and voluntarily.'"[55] Although the court noted that a fixed incantation is not necessary to satisfy the requirements of Rule 4-246,[56] it found that the defendant's right to have "some knowledge of the jury trial right" was clearly violated.[57]

Although the court examined some elements of Rule 4-246(b) in *Martinez*, *Hall*, and *Tibbs*, it never directly addressed whether Rule 4-246 mandates a defendant be informed of the jury unanimity requirement. In the absence of Maryland precedent, it is helpful to look to other jurisdictions that have addressed the issue. Several jurisdictions have held that a defendant need not be specifically advised of the unanimity requirement in order to effectively waive his right to a jury trial.[58]

In *People v. Fields*,[59] the California Court of Appeals for the Fourth District found that when a defendant is represented by competent counsel, the trial court does not have a duty to inform the defendant about "'all the ins and outs' of a jury trial," the advantages and disadvantages of a jury trial, or the unanimity requirement before ac-

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51. *See id.* at 183, 582 A.2d at 510 (concluding that the "constitutional due process requirements were not transgressed").

52. 323 Md. 28, 590 A.2d 550 (1991).

53. *See id.* at 31, 590 A.2d at 551 ("Considering the totality of the circumstances in the present case, . . . we hold that the record is woefully deficient to establish that Tibbs knowingly and voluntarily relinquished his right to a jury trial." (citation omitted)).

54. *Id.* (citing *Hall*, 321 Md. at 183, 582 A.2d at 507; Martinez v. State, 309 Md. 124, 522 A.2d 950 (1987)).

55. *Id.* at 32, 590 A.2d at 551.

56. *See id.* at 31, 590 A.2d at 551 (explaining that "no fixed litany need be followed in complying with Maryland Rule 4-246").

57. *Id.* at 32, 590 A.2d at 551-52.

58. *See, e.g.*, People v. Fields, 76 Cal. Rptr. 2d 700, 702 (Ct. App. 1998); People v. Denis, 620 N.Y.S.2d 614, 616 (App. Div. 1994).

59. 76 Cal. Rptr. 2d 700 (Ct. App. 1998).

cepting defendant's choice to waive a jury trial.[60] Similarly, in *People v. Dennis*,[61] the Supreme Court of New York, Appellate Division, upheld a defendant's conviction even though the trial court did not advise him that a conviction requires jury unanimity when he waived his right to a jury trial.[62]

b. Trend in Other Jurisdictions.—In some jurisdictions, courts have recommended that defendants be informed of the unanimity requirement but have stopped short of making it mandatory. The Sixth Circuit, in *United States v. Martin*,[63] implored the district courts to "personally inform each defendant of the benefits and burdens of jury trials on the record prior to accepting a proffered waiver."[64] It then declined to "join several courts which ha[d] adopted mandatory supervisory rules requiring trial courts to personally interrogate defendants prior to accepting a jury trial waiver."[65] The court suggested that a defendant, "[a]t a minimum," be informed that a jury is composed of twelve people, that he may participate in the selection of jurors, that a jury verdict must be unanimous, and, should he waive his right to a jury trial, that a judge will decide his innocence or guilt.[66]

In *United States v. Cochran*,[67] the Ninth Circuit, citing *Martin*, held that a failure to follow a fixed colloquy pertaining to a defendant's voluntary, knowing, and intelligent waiver of a jury trial did not "ipso facto constitute reversible error."[68] The court stated: "[W]e implore district courts to inform defendants that (1) twelve members of the community compose a jury; (2) the defendant may take part in jury selection; (3) jury verdicts must be unanimous; and (4) the court

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60. *Id.* at 702 (citing People v. Wrest, 839 P.2d 1020 (Cal. 1992); People v. Tijerina, 459 P.2d 680 (Cal. 1969); People v. Lookadoo, 425 P.2d 208 (Cal. 1967); People v. Castaneda, 52 Cal. App. 3d 334, 344 (Ct. App. 1975); People v. Acosta, 18 Cal. App. 3d 895, 902 n.4 (Ct. App. 1971)).

61. 620 N.Y.S.2d 614 (App. Div. 1994).

62. *Id.* at 616; *see also* Tucker v. Sate, 547 So. 2d 270, 271 (Fla. 1989) (noting that Florida Rules of Criminal Procedure do not require a defendant be informed of the jury unanimity requirement); People v. James, 481 N.W.2d 715, 717 (Mich. 1992) (holding that Michigan law does not require that a criminal defendant be informed of the unanimity requirement).

63. 704 F.2d 267 (6th Cir. 1983).

64. *Id.* at 274.

65. *Id.* at 275 (citing United States v. Scott, 583 F.2d 362, 364 (7th Cir. 1978); Hawkins v. United States, 385 A.2d 744, 747 (D.C. App. Ct. 1978); Biddle v. State of Maryland, 40 Md. App. 399, 400-03, 392 A.2d 100, 101-03 (1978); Ciummei v. Commonwealth, 392 N.E.2d 1186, 1189 (Mass. 1979)).

66. *Id.* at 274-75.

67. 770 F.2d 850 (9th Cir. 1985).

68. *Id.* at 853.

alone decides guilt or innocence if the defendant waives a jury trial."[69] The Ninth Circuit, however, concluded that the adoption of a rule requiring such information be given was "unnecessary."[70]

The Tenth Circuit joined the Sixth and Ninth Circuits in rejecting a strict litany requirement. In *United States v. Robertson*,[71] the Tenth Circuit declined to interpret Federal Rule of Criminal Procedure 23(a)[72] as requiring any specific litany, stating that "little is served by rigidly requiring compliance with the Rule."[73] In accordance with the Sixth and Ninth Circuits, the Tenth Circuit did, however, strongly recommend that trial courts advise defendants of the most salient features of a jury trial.[74]

Finally, a few jurisdictions have required trial courts to specifically inform defendants of certain features of a jury trial, such as the unanimity requirement.[75] The Supreme Court of Pennsylvania, in *Commonwealth v. Hughes*,[76] ordered that

> [p]rior to accepting a defendant's waiver of his right to a jury trial, the trial court must conduct a colloquy wherein it apprises the defendant of the three essential elements of a jury trial: that the jury would be selected from members of the community; that the verdict must be unanimous; and that the defendant would be allowed to participate in the selection of the jury.[77]

Similarly, in *State v. West*,[78] the Supreme Court of Vermont found that before a defendant may waive his right to a jury trial he must be addressed in open court to determine that he "understands . . . [t]hat before the defendant can be convicted, all 12 members of the jury

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69. *Id.* (citing *Martin*, 704 F.2d at 274-75).

70. *Id.*

71. 45 F.3d 1423 (10th Cir. 1995).

72. *See* FED. R. CRIM. P. 23(a) (setting forth that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government").

73. *Robertson*, 45 F.3d at 1431.

74. *See id.* at 1432 (noting the "significance of the right to a jury trial and the importance of the decision to waive that right," and explaining that a defendant "should be informed" of the number of people composing a jury, the defendant's role in jury selection, the unanimity requirement, and that in a bench trial, the "court alone decided guilt or innocence" (citing United States v. Cochran, 770 F.2d 850, 853 (9th Cir. 1985); United States v. Martin, 704 F.2d 267, 274-75 (6th Cir. 1983); United States v. Delgado, 635 F.2d 889, 890 (7th Cir. 1981))).

75. *See, e.g.*, State v. West, 667 A.2d 540 (Vt. 1995); Commonwealth v. Hughes, 639 A.2d 763 (Pa. 1994); State v. Resio, 436 N.W.2d 603 (Wis. 1989).

76. 639 A.2d 763 (Pa. 1994).

77. *Id.* at 772 (citing Commonwealth v. Williams, 312 A.2d 597 (Pa. 1973)).

78. 667 A.2d 540 (Vt. 1995).

must agree on defendant's guilt."[79] In addition to the Supreme Courts of Pennsylvania and Vermont, the Supreme Court of Wisconsin has also directed trial courts to inform defendants of the unanimity requirement.[80]

3. The Court's Reasoning.—In *Bell*, the Court of Appeals held that Rule 4-246(b) does not require a specific litany of advice regarding jury unanimity.[81] In reaching this conclusion, the court examined the legislative history[82] and plain meaning of Rule 4-246(b)[83] and case law addressing similar issues from Maryland and other jurisdictions.[84] The court first focused on the change in language between Rule 4-246(b) and its predecessor, Rule 735(d).[85] The *Bell* court noted that the legislature, in drafting Rule 4-246(b), replaced the term "full knowledge," found in Rule 735, with the term "knowingly and voluntarily."[86] In analyzing the plain meaning of "full knowledge" and "knowingly and voluntarily," the court turned to the definitions found in *The Random House Dictionary Of The English Language*.[87] The dictionary defines "full," in part, as "complete; entire; maximum . . . of the maximum . . . extent, volume," "knowledge" as "acquaintance with facts, truths, or principles . . . awareness, as of a fact or circumstance" and "knowingly" as "having knowledge or information; conscious; intentional; deliberate."[88] The court also examined the definitions in *Black's Law Dictionary*, and found similar results.[89] Given the diction-

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79. *Id.* at 545 n.1 (quoting V.R. CRIM. P. 23(a)).

80. *See* State v. Resio, 436 N.W.2d 603, 607 (Wis. 1989) (stating "we direct that, from the date of the mandate of this decision, a circuit court in a criminal case must advise the defendant that the court cannot accept a jury verdict that is not agreed to by each member of the jury"). Notwithstanding this directive, the court held that knowledge of the unanimity requirement was not constitutionally required. *Id.* at 607.

81. *Bell*, 351 Md. at 730, 720 A.2d at 321.

82. *See id.* at 721-24, 720 A.2d at 317-19 (focusing on the rules of procedure recommended by the Standing Committee on Rules of Practice and Procedure that were subsequently rejected by the Court of Appeals).

83. *See id.* at 719-21, 720 A.2d at 316-17 (examining both common dictionary and legal dictionary definitions).

84. *See id.* at 724-30, 720 A.2d at 319-21 (examining relevant case law from Maryland and cases from jurisdictions that analyzed a fixed litany required).

85. *See id.* at 716-17, 720 A.2d at 314-15 (noting the change in language between Rule 4-246(b) and Rule 735(d)).

86. *Id.* at 717-18, 720 A.2d at 315.

87. *Id.* at 716, 720 A.2d at 316 (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 573 (unabr. ed. 1983)).

88. *See id.*

89. *Id.* at 719-20, 720 A.2d at 316 (quoting BLACK'S LAW DICTIONARY 672 (6th ed. 1990)). *Black's* defines "full" as "[a]bundantly provided, sufficient in quantity or degree, complete, entire . . . ," and "knowledge" as "[a]cquaintance with fact or truth." BLACK'S LAW DICTIONARY 872 (6th ed. 1990).

ary meanings of the statutory language, the court concluded that "full knowledge" required a defendant to be "apprized completely of the jury's function at trial and his right to be tried by a jury."[90] The court contrasted this with the language of 4-246, which defines "knowingly" as "having knowledge or information."[91] The court stated that "[i]t would seem, accordingly, that the alterations in the language of the rule from *Countess* to present day would indicate this Court's intent to replace the more stringent 'full knowledge' requirement with a more flexible 'knowingly' made waiver requirement."[92] With respect to the unanimity requirement, the court found that a defendant's knowledge no longer needed to be "complete" or "entire."[93]

The court next turned to the Rule's legislative history.[94] Specifically, the court examined rejected amendments to Rule 735.[95] The focus of its examination was on the proposed amendment to Rule 735, which stated, in part:

> The court may not accept the waiver until it determines, after an examination of the defendant . . . that the defendant voluntarily waived a jury trial, understanding that . . . [b]efore a finding of guilty in a jury trial, all 12 jurors must agree that the defendant is guilty.[96]

The *Bell* court noted that the rejection of that proposal "implies that we wished to move away from the rigidity of the former rule 735 and *Countess*."[97]

Finally, the court reviewed relevant case law. In examining Maryland cases, the *Bell* court noted several decisions in which it addressed

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90. *Bell*, 351 Md. at 720, 720 A.2d at 316.

91. *Id.* (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 793 (unabr. ed. 1983)).

92. *Id.*, 720 A.2d at 317.

93. *Id.* at 730, 720 A.2d at 321 (citing BLACK'S LAW DICTIONARY 672 (6th ed. 1990)).

94. *Id.* at 721-23, 720 A.2d at 317-18. The court, citing *Tracey v. Tracey*, 328 Md. 380, 614 A.2d 590 (1992), stated that "[w]hile the language of the statute is the primary source for determining legislative intention . . . it is not absolute . . . [t]he court will look at the larger context, including the legislative purpose, within which statutory language appears." *Id.* at 718, 720 A.2d at 315 (internal quotations omitted) (quoting *Tracey*, 328 Md. at 387, 614 A.2d at 594).

95. The court cited to other cases in which they examined proposed amendments. *See Bell*, 351 Md. at 721-23, 720 A.2d at 317 (discussing Armstead v. State, 342 Md. 38, 77-83, 673 A.2d 221, 240-43 (1996); Harris v. State, 331 Md. 137, 150-54, 626 A.2d 946, 952-54 (1993); Krauss v. State, 322 Md. 376, 386, 587 A.2d 1102, 1106 (1991)).

96. *See id.* at 723, 720 A.2d at 318 (citing Seventy-Fifth Report of the Standing Committee on Rules of Practice and Procedure, 2-3 & app. (Oct. 26, 1981)).

97. *Id.* at 724, 720 A.2d at 318; *see also* State v. Marsh, 337 Md. 528, 535, 654 A.2d 1318, 1321-22 (1995) (noting that the purpose of the adoption of Rule 4-246 was "to make the Rule more flexible by eliminating the prescribed litany").

peripheral issues relevant to the case at hand.[98] In *Hall* it stated that, under Rule 4-246(b), the court "need not recite any fixed incantation" and that whether a waiver of a jury trial was valid depended on the facts and circumstances of the case.[99] The court continued differentiating *Tibbs*, in which the court held the defendant's waiver was invalid, from *Bell*. It found, applying the "depends upon the facts of the case" approach, that the record in *Tibbs* was "woefully deficient" and did not establish that the defendant had knowingly waived his right.[100] The court concluded its analysis by reviewing the relevant caselaw of other jurisdictions. The court discussed cases that do not require a fixed litany, cases requiring a strict litany, and cases recommending, but not requiring, such a litany.[101] The *Bell* court concluded that the number of jurisdictions not requiring a fixed litany in regard to jury unanimity outweigh those that do.[102]

4. Analysis.—In *Bell*, the Court of Appeals held that Rule 4-246(b) does not require a criminal defendant to be advised of the jury unanimity requirement.[103] The *Bell* court reached this conclusion by a thorough examination of Rule 4-246(b)'s legislative history, its plain meaning, and case law addressing the issue. In so doing, the court reached the proper decision based upon Rule 4-246(b). This decision, however, could remove an important safeguard in assuring the knowing waiver of the fundamental right to a jury trial.

a. Analysis of Court's Reasoning.—The analysis conducted by the *Bell* court was thorough and well reasoned.[104] The language once contained in Rule 735, "full knowledge," was deleted and eventually replaced with "knowingly." To ascertain the rational for this change,

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98. *See Bell*, 351 Md. at 725-26, 720 A.2d at 319 (discussing Tibbs v. State, 323 Md. 28, 590 A.2d 550 (1991); State v. Hall, 321 Md. 178, 582 A.2d 507 (1990)).

99. State v. Hall, 321 Md. 178, 182-83, 582 A.2d 507, 509 (1990) (citing Martinez v. State, 309 Md. 124, 134, 522 A.2d 950, 955 (1987)).

100. *See Bell*, 351 Md. at 725, 720 A.2d at 319 (stating that the record failed to show that Tibbs received any information at all concerning the nature of a jury trial).

101. *Id.* at 727-30, 720 A.2d at 320-21 (reviewing an extensive list of both state and federal jurisdictions and their decisions on the requirements for waiver of the right to a jury trial).

102. *Id.* at 730, 720 A.2d at 321 (stating that "it appears that a majority of jurisdictions either have no requirement that a trial court must describe jury unanimity to the defendant or only recommend that they do so").

103. *Id.*

104. The Court of Special Appeals, in reaching the opposite conclusion, did not examine legislative intent and ignored the reasoning behind the change in language from Rule 735 to Rule 4-246. *See generally* Bell v. State, 118 Md. App. 64, 77-82, 701 A.2d 1183, 1189-92 (1997) (focusing instead on case law and stating that Rule 426(b) requires no less than its predecessor rule).

the court turned to one of the few sources available to them—legislative intent. The Court of Appeals has given credence to the approach of examining legislative intent through proposed, but rejected, amendments.[105] The Court of Appeals rejected the proposals for a revised Rule 735 that would have required a mandatory colloquy specifically including the unanimity requirement.[106] The proposal that was eventually adopted did not include a fixed litany requirement; rather, it provided that a defendant's waiver must be made "knowingly." The rejection of the proposal requiring a defendant to be informed that a jury verdict must be unanimous indicates the court's intent to free itself from the constraints associated with a fixed litany.[107]

In addition to the support found in the legislative history, the meaning of the express language of the rules also supports the *Bell* court's decision. It is indisputable that the language changed from Rule 735 to Rule 4-246.[108] The term "full knowledge" was removed and replaced with "knowingly."[109] The *Bell* court concluded that this change was designed to lessen the level of knowledge required to waive a right to a jury trial.[110] The change in language, the court explained, indicated that the level of knowledge no longer needed to be "complete" or "entire."[111] This is a fair interpretation of the language based on its dictionary meanings.[112] The plain meaning of language contained in a statute is crucial to that statute's interpretation. The *Bell* court was therefore correct to examine such meaning and also correct in the conclusions thus reached.

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105. *See* NCR Corp. v. Comptroller, 313 Md. 118, 125, 544 A.2d 764, 767 (1988) (stating that "[w]hile a committee's rejection of an amendment is clearly not an infallible indication of legislative intent, it may help our understanding of overall legislative history"); *see also* Prince George's County v. Commission on Human Relations, 40 Md. App. 473, 489, 392 A.2d 105, 115 (1978) (noting that the court may "consider rejection by the General Assembly . . . as an indication of the legislative will").

106. *See supra* note 96.

107. *See* State v. Marsh, 337 Md. 528, 535, 654 A.2d 1318, 1321-22 (1995) (explaining that the purpose of the changes to Rule 735 was to make the Rule "more flexible by eliminating the prescribed litany").

108. *Cf. supra* notes 22, 35.

109. *See supra* notes 33-35.

110. *See Bell*, 351 Md. at 721, 720 A.2d at 318 (agreeing with the state that "knowingly" is a lesser standard than "full knowledge" and only requires that a defendant possess a general knowledge of the nature of a jury trial).

111. *Id.* at 730, 720 A.2d at 321 (defining statutory language by referencing dictionary definitions).

112. The court used both a common and legal dictionary to obtain its definitions. *Id.* at 720-21, 720 A.2d at 316 (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 573 (unabr. ed. 1983); BLACK'S LAW DICTIONARY 672 (6th ed. 1980)).

The final step in the *Bell* court's discussion, a review of relevant case law, also strongly supported the court's rejection of a strict litany requirement.[113] Although *Bell* was the first case to address the unanimity requirement under Rule 4-246, other Maryland cases have addressed issues relevant to the unanimity requirement.[114] The court's holding is consistent with post-Rule 735 decisions which have noted that no "fixed incantation" is necessary in determining whether a defendant knowingly waived his right to a jury trial.[115] Additionally, the court cited several cases proposing that whether a waiver has been knowingly made should be judged on a case-by-case basis.[116] Although these decisions do not directly address the unanimity requirement, they demonstrate the court's general unwillingness to adopt a fixed rule pertaining to a waiver of jury a trial.

b. Analysis Of The Implications Of The Bell Decision.—While the *Bell* court's analysis is a well grounded interpretation of Rule 4-246, its holding could potentially jeopardize protections aimed at insuring the "knowing" waiver of jury trials. Trial by jury is fundamental to American criminal law.[117] The right is preserved by Article III, section 2 of the Constitution which states: "[t]he trial of all crimes . . . shall be by Jury."[118] The Sixth Amendment further provides that: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[119] Moreover, the unanimity requirement is one of the hallmarks of the jury trial system as evidenced by its

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113. *See Bell*, 351 Md. at 724-30, 720 A.2d at 320-21. The *Bell* court noted that some jurisdictions require a fixed litany pertaining to unanimity. *Id.* (citing State v. West, 667 A.2d 540 (Vt. 1995); Commonwealth v. Hughes, 639 A.2d 763 (Pa. 1994); State v. Resio, 436 N.W.2d 603 (Wis. 1989)). Other jurisdictions, however, require no fixed litany. *See id.* (citing People v. Fields, 76 Cal. Rptr. 2d 700 (Cal. App. 4 Dist. 1998); People v. Denis, 620 N.Y.S.2d 614, 616 (A.D. 3 Dept. 1994)). Finally, the *Bell* court identified jurisdictions that recommend, but do not require, a litany. *Id.* (citing United States v. Robertson, 45 F.2d 1423 (10th Cir. 1995); United States v. Cochran, 770 F.2d 850 (9th Cir. 1985); United States v. Martin, 704 F.2d 267 (6th Cir. 1983)).

114. *Id.* at 717, 720 A.2d at 315 (noting that the Court of Appeals had not yet addressed whether a defendant could knowingly waive his right to a jury trial without "specific reference to the unanimity requirement during the in-court advice given to a defendant about whether to elect a court or jury trial").

115. *See* Martinez v. State, 390 Md. 124, 134, 522 A.2d 950, 954 (1987) (stating that "[i]n determining whether the defendant has knowingly and voluntarily waived his right to a jury trial, the questioner need not recite any fixed incantation").

116. *See supra* notes 83-84 (citing to State v. Hall, 321 Md. 178, 582 A.2d 507 (1990); Tibbs v. State, 323 Md. 28, 590 A.2d 550 (1991)).

117. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (noting that jury trials help prevent government oppression and arbitrary law enforcement).

118. U.S. CONST. art. III, § 2.

119. U.S. CONST. amend. VI.

inclusion in the Maryland Declaration of Rights.[120] Article 21 of the Maryland Declaration of Rights states: "[t]hat in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."[121] The fundamental importance of the unanimity requirement has also been expressed by the Maryland Court of Appeals in stating that "a unanimous jury verdict is a fundamental constitutional right guaranteed to the defendant in a criminal case."[122]

The establishment of the right to a jury trial, and the unanimity requirement contained therein, is fundamental to American jurisprudence and therefore must be protected. Within the framework of our system, the trial court must bear substantial responsibility for preserving that right.[123] The Supreme Court has reiterated this point by noting that

> [t]rial by jury is the . . . preferable mode of disposing of issues of fact in criminal cases . . . . In such cases the value and appropriateness of a jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof. . . .[124]

Trial courts make the initial determination of whether a defendant has "knowingly" waived his right to a jury trial. They are in the best position to ensure that the defendant has done so. This determi-

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120. *See* State v. McKay, 280 Md. 558, 572, 375 A.2d 228, 240 (1977) (stating that "a unanimous jury verdict is a fundamental constitutional right"); *see also* MD. DECL. OF RIGHTS art. 21.

121. MD. DECL. OF RIGHTS art. 21.

122. State v. McKay, 280 Md. 558, 572, 375 A.2d 228, 240 (1977).

123. *See* United States v. Martin, 704 F.2d 267, 272 (6th Cir. 1983) (noting that the trial level court has a responsibility to "jealously preserv[e] jury trials").

124. Patton v. United States, 281 U.S. 276, 312 (1930); *see also* Williams v. Florida, 399 U.S. 78, 100 (1970) (stating that the protection provided by a jury "lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen").

nation is best accomplished by a colloquy between the court and the defendant concerning the most salient features of a jury trial. Most jurisdictions agree that the most important aspects of a jury trial include: that the jury consists of twelve members of the community, that the defendant may take part in the selection of the jury, and that the jury verdict must be unanimous.[125] Conducting such a colloquy serves several purposes, most importantly of which is to insure that waivers are made voluntarily and knowingly. When a trial court provides this information about the nature of a defendant's jury trial right, it helps insure that defendants have a basic understanding of a jury trial before they decide whether to waive that right.[126] Additionally, a trial court is in a better position to ascertain whether a waiver, is in fact, being offered knowingly and voluntarily if it in fact conducts a colloquy with the defendant.[127]

Conducting an adequate colloquy also emphasizes the importance of the waiver decision to the defendant. Making such a determination on the record and in open-court requires the defendant to give some level of consideration to the issue of waiver especially in responding to questions from the court. This special consideration is especially important in light of the fundamental nature of the right to a jury trial.[128]

Finally, the importance of informing a defendant of the unanimity requirement promotes judicial economy. A fixed litany that incorporates the most important aspects of a jury trial will, in most cases, meet the requirements for an adequate waiver of a jury trial.[129] Respectfully, it would avoid challenges to the validity of convictions on appeal.

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125. *See supra* note 74.

126. *See* United States v. Cochran, 770 F.2d 850, 853 (9th Cir. 1985) (noting that when defendants are informed that twelve people compose a jury, that the defendant can take part in jury selection and that jury verdicts must be unanimous that defendants should have a basic understanding of the jury process); *see also* United States v. Martin, 704 F.2d 267, 273 (6th Cir. 1983) (stating that "a defendant ignorant of the nature of the jury trial right cannot intelligently weigh the value of the safeguard . . . [and] therefore should have . . . some knowledge of the jury trial right before he is allowed to waive it").

127. *See Martin*, 704 F.2d at 272-73; *see also* United States v. Hunt, 413 F.2d 983, 984 (4th Cir. 1969) (explaining that an interrogation, by the district judge, of a defendant who has elected to waive his right to a jury trial "would provide the district judge with an additional factual basis on which to grant or withhold his approval of the waiver").

128. *See Cochran*, 770 F.2d at 852 (noting that such colloquies emphasize the importance of jury waiver).

129. *See supra* note 74 (outlining the most important features of a jury trial to be included in a litany).

5. Conclusion.—While the *Bell* court was accurate in its interpretation of Rule 4-246(b), there are potential problems that may stem from its decision. The right to a jury trial, and, more specifically, the unanimity requirement are an integral part of our criminal law system.[130] They should therefore be afforded some protection. This protection is not well served by random, unstructured, and inconsistent colloquies with defendants. This notion was perhaps best summarized by the Ninth Circuit which stated: "[t]here is, thus, every reason for district courts to conduct a colloquy before accepting a waiver of the right to trial by jury and no apparent reason for not doing so."[131]

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130. *See supra* notes 117-122 (noting the right to a jury trial and the unanimity requirements inclusion in the Constitutions of the United States and the State of Maryland).

131. *Cochran*, 770 F.2d 850.

C. *Defining the Scope of the Search Incident to an Arrest Doctrine*

In *State v. Evans*,[1] the Court of Appeals of Maryland held that conducting a search incident to an arrest that does not result in a trip to the station house comports with both the Fourth Amendment[2] and the definition of arrest under Maryland law.[3] While the court was correct in reaching its conclusion that conducting a search incident to an arrest does not violate the Fourth Amendment simply because the arrest did not result in a trip to the station house, the court reached this conclusion by questionable means, never considering the meaning of the Supreme Court's requirement that a search may only be conducted pursuant to a "custodial arrest."[4] But because conducting searches incident to *any* probable cause-based arrests—including arrests that do not result in a trip to the station house—are inherently "reasonable," provided that the search is necessary to obtain valuable evidence needed to prosecute the arrestee for the crime committed, the Court of Appeals reached the proper conclusion in finding that such searches are constitutional. With regard to the requirements of an arrest in Maryland, the Court of Appeals in *Evans* eliminated the "intent to prosecute language"[5] that had traditionally been used as a meaningless garnish to its arrest requirements.[6] In so doing, the court logically aligned Maryland's definition of arrest with that of the Supreme Court,[7] which will have the effect of allowing police officers to investigate criminal wrongdoing more effectively, without infringing upon individual privacy rights.

1. The Case.—In 1994, the Baltimore City Police Department Violent Crimes Task Force conducted an undercover operation known

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1. 352 Md. 496, 723 A.2d 423 (1999).

2. "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

3. 352 Md. at 530, 723 A.2d at 439; *see id.* at 519, 723 A.2d at 434 (finding dispositive whether "the initial detentions of Respondents constituted lawful arrests under Maryland law").

4. *See* United States v. Robinson, 414 U.S. 218, 236 (1973) (explaining that "it is the fact of custodial arrest which gives rise to the authority to search"); *Evans*, 352 Md. at 516-19, 723 A.2d at 432-34 (discussing the requirements of a lawful search incident to an arrest); *see also infra* notes 126-133 and accompanying text (discussing the court's failure to analyze the purpose of the "custodial arrest" requirement).

5. *Evans*, 352 Md. at 515, 723 A.2d at 432 (rejecting the argument "that failure of the police to initiate the formal criminal charging process at or near the time of the initial detention precludes a valid arrest under Maryland law").

6. *See infra* Part 2.e (describing the Court of Appeals's application of its arrest requirements).

7. *See infra* notes 68-71 and accompanying text (describing the Supreme Court's arrest requirement).

as "Operation Mid-East" to combat street-level drug transactions in targeted Baltimore communities.[8] Throughout this operation, undercover police officers would buy as many drugs as they could within a specific period of time to identify and to collect evidence against as many drug dealers as possible within the targeted community.[9] A plain-clothed police officer would initiate contact with a suspected drug dealer by attempting to purchase illegal narcotics with marked police money.[10] Once the drug transaction was completed, the officer would transmit a description of the suspect to an "identification team" through a body wire, whereupon the identification team would locate and detain the suspect.[11] Once detained, the identification team would search the suspect, seize narcotics and currency found on his person, photograph him, verify his address,[12] and then release him.[13]

Suspects were not taken to the station house for booking at the time of the detention because "information about the arrests would leak out and endanger the future of the undercover operation."[14] Operation Mid-East was intended to "make a major impact on the [targeted] area," and could only be effective if police executed a "mass arrest."[15] After continuing for approximately one month, Operation Mid-East culminated in a "hit day," when task force members returned to the targeted communities and made mass arrests of all the individuals that they had detained for selling illegal narcotics.[16]

On June 9, 1994, while taking part in Operation Mid-East as an undercover agent, Officer Kenneth Rowell approached appellant Dwight Evans and asked "if he was working."[17] After Evans responded that he had "dimes of coke," Officer Rowell produced a marked ten dollar bill and Evans handed the officer a vial of cocaine.[18] Once the transaction was complete, Officer Rowell walked away and transmitted

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8. Evans v. State, 113 Md. App. 347, 351, 688 A.2d 28, 30 (1997), *rev'd*, 352 Md. 496, 723 A.2d 423 (1999).

9. *See Evans*, 352 Md. at 500-01 n.1, 723 A.2d at 425 n.1 (quoting trial testimony of Evans's arresting officer, who explained that "[t]he operation is designed to buy drugs, to buy as much drugs as we can within a specific period of time").

10. *Evans*, 113 Md. App. at 351, 688 A.2d at 30.

11. *Id.*

12. *Id.* at 352 n.3, 688 A.2d at 31 n.3.

13. *Id.* at 352, 688 A.2d at 31.

14. *Id.* (internal quotation marks omitted).

15. *Id.* (internal quotation marks omitted).

16. *Id.* Operation Mid-East resulted in the arrest of sixty individuals. *Id.*

17. *Id.* (internal quotation marks omitted).

18. *Id.* at 352-53, 688 A.2d at 31.

a description of Evans to the technical team.[19] Five to ten minutes later, after receiving confirmation that a man fitting Evans's description was stopped, Officer Rowell drove past the scene of the detainment and confirmed that the man in custody was in fact the individual who sold him the cocaine.[20]

After Evans was stopped, the officers explained that they were conducting an investigation and then photographed Evans, searched him, and verified his identification.[21] An initial search of Evans produced $163 in currency, but the officers were unable to find any narcotics.[22] The officers then contacted Officer Rowell to inquire about where Evans may have hidden the narcotics, and Rowell stated that Evans had taken the narcotics from his "rear area."[23] An officer proceeded to conduct a rectal search of Evans, whereupon he recovered nine glass vials of cocaine.[24] Evans was then given a receipt for the seized money and released.[25] At no time during the detainment did police formally charge Evans or transport him to the station house.[26] The only formal action taken with regard to the detainment of Evans was that officers followed an internal police procedure of filling out an "Investigated and Released" form.[27]

On July 5, 1994, twenty-six days after being detained and searched by the police, Evans was indicted by the Grand Jury for Baltimore City on three counts: distribution of cocaine, possession of co-

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19. *Id.* at 353, 688 A.2d at 31. The technical team was "on hand to videotape the transaction and to maintain communication with the officer throughout the operation." *Id.* at 352, 688 A.2d at 31.

20. *Id.* at 353, 688 A.2d at 31.

21. *Id.* The police called Evans's father, who came to the area to confirm his son's identity. *Evans*, 352 Md. at 502, 723 A.2d at 426. It is important to note, for the purpose of later discussion, that the trial court found that "[Evans] was not free to go until [the police] secured his identification." *Id.* at 503, 723 A.2d at 426 (first alteration in original).

22. *Evans*, 113 Md. App. at 353, 688 A.2d at 31.

23. *Id.*

24. *Id.* The legality of conducting a body cavity search in this circumstance was not considered by the Court of Special Appeals because Evans's motion to suppress the seized drugs did not mention or allude to the rectal search. *Id.* at 353 n.6, 688 A.2d at 31 n.6 (citing Riddick v. State, 319 Md. 180, 183, 571 A.2d 1239, 1240-41 (1990); Trusty v. State, 308 Md. 658, 760-72, 521 A.2d 749 (1987)).

25. *Evans*, 352 Md. at 502, 723 A.2d at 425-26.

26. *Id.* at 502, 723 A.2d at 426. At the suppression hearing, however, Officer Dobbins stated that at the time of the detention, the police intended to "seize the drugs and the money [and] to come back later as an impact on that area and to make mass arrests." *Id.* at 520 n.17, 723 A.2d at 435 n.17 (alteration in original).

27. *Id.* at 502, 723 A.2d at 426. Officer Dobbins, a member of the technical team, testified that an "Investigated and Released" form was the alternative to taking a suspect to the police station and processing formal charges. *Id.* at 502 n.2, 723 A.2d at 426 n.2.

caine with an intent to distribute, and possession of cocaine.[28] Evans filed a motion to suppress all of the evidence seized by the police, claiming the search that produced the evidence was unlawful because he was never placed under arrest.[29]

Denying Evans's motion to suppress, the trial court found that the search of Evans was incident to a valid arrest.[30] In reaching this conclusion, Judge Prevas, of the Circuit Court for Baltimore City, stated that "the word 'arrest' is a word of art . . . because . . . [Evans] was not free to go until [the police] secured his identification . . . it really was, in fact, an arrest for Fourth Amendment purposes."[31] Evans was subsequently convicted of distribution of cocaine and possession of cocaine with an intent to distribute and sentenced to fourteen years in prison for the distribution charge and five years for possession with an intent to distribute.[32]

A divided Court of Special Appeals reversed the decision of the Circuit Court for Baltimore City, holding that the detention of Evans did not constitute an arrest, and that the search conducted by police incident to the detention was unconstitutional.[33] Stating that the U.S. Supreme Court's discussions of what constitutes an arrest under the warrantless search incident to an arrest doctrine have been "skimpy,"[34] the Court of Special Appeals turned to Maryland case law to determine whether the detention of Evans constituted an arrest.[35]

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28. *See id.* at 502, 723 A.2d at 426. These offenses are violations of Maryland Code, Article 27, §§ 286-287. *Id.*

29. *See id.* at 502-03, 723 A.2d at 426 (describing the relevant pre-trial motions and the circuit court's rulings thereon).

30. *Evans*, 113 Md. App. at 354, 688 A.2d at 32. In the alternative, the court found that "in the event that [the detainment of Evans] wasn't an arrest . . . it was a detention for the purpose of getting the evanescent evidence . . . which would have been gone if [the officers] had at that time decided to get an arrest warrant and arrest him some time later." *Id.* at 355, 688 A.2d at 32 (internal quotation marks omitted).

31. *Id.* at 354, 688 A.2d at 32. Judge Prevas continued, stating that "[f]or Fourth Amendment purposes, its [sic] not necessary that [Evans] be taken to the District Court Commissioner, given a Statement of Charges, and sent to a commissioner for processing . . . for bail in order for it to be an arrest." *Id.*

32. *Evans*, 352 Md. at 503, 723 A.2d at 426.

33. *Evans*, 113 Md. App. at 363-64, 688 A.2d at 36; *id.* at 369, 688 A.2d at 39. The Court of Special Appeals also determined that the search could not be justified using the "evanescent evidence" exception to the warrant requirement. *Id.* at 368-69, 688 A.2d at 38-39.

34. *Id.* at 357, 688 A.2d at 33.

35. *Id.* at 359, 688 A.2d at 34. The Court of Special Appeals did state, though, that the Supreme Court "insist[s] not only on the fact of a formal arrest as the indispensable predicate for a search incident to lawful arrest but also insist[s] that the arrest be 'custodial' in nature and not simply a processing at the scene of the arrest." *Id.* at 357, 688 A.2d at 33.

After discussing the requirements for arrest under Maryland law,[36] the Court of Special Appeals concluded that because the officers involved in Operation Mid-East lacked "any intention . . . to arrest the appellant"[37] and because the officers failed to communicate to Evans that he had been placed under arrest, the detention of Evans did not constitute an arrest under Maryland law.[38] Therefore, the court concluded that the search, which yielded the money and drugs, was illegal.[39]

The Court of Appeals granted the State petition for certiorari to consider (1) "whether the police officers' encounters with Evans . . . constituted an arrest under the law of Maryland" and, if necessary, (2) "whether the officers' search[ ] of Evans . . . [was] justifiable under the 'search incident to arrest' exception to the warrant requirement of the Fourth Amendment."[40]

2. Legal Background.—While the Supreme Court has found that states are free to develop their own search and seizure laws to meet the needs of local law enforcement, such laws must fall within the con-

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36. *See id.* at 359-65, 688 A.2d at 34-37 (discussing Bouldin v. State, 276 Md. 511, 350 A.2d 130 (1976); McChan v. State, 238 Md. 149, 207 A.2d 632 (1965); Cornish v. State, 215 Md. 64, 137 A.2d 170 (1957); Anderson v. State, 78 Md. App. 471, 553 A.2d 1296 (1989)).

37. *Evans*, 113 Md. App. at 361 n.7, 688 A.2d at 35 n.7.

38. *Id.* The Court of Special Appeals concluded that what is required for an arrest under Maryland law is "1) on the part of the arresting officer an actual subjective intent to arrest the suspect and 2) some communication of that fact to the suspect." *Id.* Dissenting, Judge Sonner took issue with this conclusion, stating that the analysis of Evans's appeal should be limited to a determination of whether, at the time Evans was detained, the police had "the necessary probable cause to permit them to arrest and to make a reasonable search, or whether the search was justified by some other exception to the warrant requirement." *Id.* at 376, 688 A.2d at 43 (Sonner, J., dissenting). But even following the majority's logic, Sonner believed that the outcome of this case was incorrect because "[n]o one can seriously contend that [Evans] was not 'arrested' by the police when he was stopped and detained and then subjected to two searches." *Id.* at 376, 688 A.2d at 42.

This statement is at odds, however, with the testimony of officer Wanda Dobbins, who stated on cross-examination that "the police did not intend to arrest the appellant and, indeed, did not arrest him." *Id.* at 361, 688 A.2d at 35. *But see supra* note 26 (noting other portions of Officer Dobbins's testimony in which she explained that the intent of the police was to make mass arrests in the near future).

39. 113 Md. App. at 369, 688 A.2d at 39.

40. *Evans*, 352 Md. at 511, 723 A.2d at 430. The Court of Appeals did not consider whether the *Evans* search was justified under the evanescent evidence exception to the warrant requirement. *Id.* at 508 n.8, 723 A.2d at 429 n.8. In granting certiorari, the Court of Appeals combined *State v. Evans* with *State v. Sykes-Bey*, stating that "both Respondents' cases [are] based upon the central question of what constitutes an arrest under Maryland law." *Id.* at 499-500, 723 A.2d at 424. The facts of *Sykes-Bey* are quite similar to those of *Evans*. Because the decision of the Court of Special Appeals in *Sykes-Bey* was unpublished, a full explanation of the facts and proceedings involved in this matter can be found in the *Evans* opinion. *Id.* at 503-06, 723 A.2d at 426-27.

fines of the Fourth Amendment.[41] Therefore, an analysis of state search and seizure laws requires the consideration of two issues: (1) does the state law comport with Fourth Amendment standards articulated by the Supreme Court, and, if so, (2) does the search or seizure comport with state law.[42]

a. Fourth Amendment Search Incident to an Arrest Requirements.—

(1) Creating the Right to Search Incident to an Arrest.—The Supreme Court defined the permissible scope of a search incident to an arrest in *Chimel v. California*,[43] where it held that when an arrest is made, an officer may conduct a search incident to the arrest to remove weapons and to seize evidence of the crime.[44] The right of officers to search incident to an arrest, the Court found, was based on the need "to remove any weapons that [an arrestee] might seek to use in order to resist arrest or effect his escape . . . [and to] seize any evidence on the arrestee's person in order to prevent its concealment

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41. *See* Sibron v. New York, 392 U.S. 40, 61 (1968) (noting that state-enacted standards governing search and seizure may not "trench[ ] upon Fourth Amendment rights"); Ker v. California, 374 U.S. 23, 34 (1963) (explaining that "[t]he States are not . . . precluded from developing workable rules governing arrests, searches and seizures").

42. *See Sibron*, 392 U.S. at 61 (citing Cooper v. California, 386 U.S. 58, 61 (1967) ("Just as a search authorized by state law may be an unreasonable one under [the Fourth Amendment], so may a search not expressly authorized by state law be justified as a constitutionally reasonable one.")).

43. 395 U.S. 752 (1969). While *Chimel* clarified the permissible scope of searches conducted incident to an arrest, the Court had recognized the constitutionality of a search incident to an arrest since 1914, but the "decisions of [the] Court bearing upon that question [had] been far from consistent." *Id.* at 755; *see, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 63 (1950) ("It is not disputed that there may be reasonable searches, incident to an arrest, without a search warrant."); Trupiano v. United States, 334 U.S. 699, 708 (1948) ("A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right . . . [t]he mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant."); Harris v. United States, 331 U.S. 145, 150-51 (1947) ("Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states." (footnotes omitted)); Agnello v. United States, 269 U.S. 20, 30 (1925) ("The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime . . . is not to be doubted." (citations omitted)); Carroll v. United States, 267 U.S. 132, 158 (1925) ("When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution" (citations omitted)); Weeks v. United States, 232 U.S. 383, 392 (1914) (acknowledging that there exists a "right on the part of the Government always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime" (citations omitted)).

44. *Chimel*, 395 U.S. at 762-63.

or destruction."[45] Reiterating a limitation placed on the search incident to an arrest exception to the warrant requirement in *Preston v. United States*,[46] the Court stated that the justification for a search incident to an arrest is "absent where a search is remote in time or place from the arrest."[47]

(2) The "Reasonableness" Standard.—Until *Terry v. Ohio*,[48] the Supreme Court treated seizures and arrests as one in the same for Fourth Amendment purposes.[49] But in *Terry*, the Court found a difference between the two,[50] and while defining what constitutes a seizure under the Fourth Amendment,[51] the Court never defined what constitutes an arrest. Instead, the Court avoided deciding this matter by holding that to determine whether a search or seizure is unreasonable, courts should consider "whether the officer's action was justified at its inception, and whether it was reasonably related in

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45. *Id.* at 763. The Court did not hold that the need to remove weapons and to seize evidence of a crime was sufficient to justify a search incident to a detention where there is probable cause to make an arrest, but at least one state has cited *Chimel* as justifying such police actions. In the 1989 case of *Vermont v. Greenslit*, 599 A.2d 672 (Vt. 1989), the Supreme Court of Vermont held:

> [I]nasmuch as there was probable cause for defendant's arrest, a search of defendant's person incidental thereto was constitutional under the doctrine enunciated in *Chimel v. California*, which allows such a search in order to prevent the destruction or concealment of evidence. The argument that defendant was not formally taken into custody and transported to the police station is of no avail, since it is the existence of probable cause for the arrest which brings the search within constitutional limits, not merely the act of taking an individual into custody.

Greenslit, 599 A.2d at 674 (citing *Sibron*, 392 U.S. at 77 (Harlan, J., concurring), which found that the prosecution "has met its total burden" upon its showing of probable cause to arrest prior to a search). For a further discussion of this theory, as articulated by Justice Harlan, see *infra* note 57 and accompanying text (discussing Justice Harlan's concurrence in *Sibron*).

46. 376 U.S. 364 (1964).

47. *Chimel*, 395 U.S. at 764 (internal quotation marks omitted) (quoting *Preston*, 376 U.S. at 367).

48. 392 U.S. 1 (1968).

49. *See* Florida v. Royer, 460 U.S. 491, 498 (1983) ("Prior to *Terry v. Ohio*, . . . any restraint on the person amounting to a seizure for the purposes of the Fourth Amendment was invalid unless justified by probable cause." (citations omitted)).

50. *See Terry*, 392 U.S. at 16 ("It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology."). Implicit in the Court's recognition of the "stop and frisk" as a valid method of police protection is its acceptance of the idea that some Fourth Amendment seizures may not reach the level of an "arrest." *See id.*

51. *See id.* ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); *see also id.* at 19 n.16 ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

scope to the circumstances which justified the interference in the first place."[52] Reasonableness, the Court found, must be determined by balancing the government's need to search against the invasion that the search entails.[53]

(3) Defining what Triggers the Search Incident to an Arrest Doctrine.—In *Sibron v. New York*,[54] the Court held that when an officer seizes a suspect and "curtail[s] his freedom of movement on the basis of probable cause," a valid arrest has been made, and the officer has the authority to search the suspect.[55] While the Court recognized that "[i]t is a question of fact precisely when, in each case, the arrest took place," it found that once a suspect has been seized, an officer has "the authority to search [the suspect]," to seize weapons, and prevent the destruction of evidence of a crime.[56] In a concurring opinion, Justice Harlan clarified the Court's handling of the search incident to arrest doctrine, stating that although

> the fruits of a search may not be used to justify an arrest to which it is incident, . . . [i]f the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, '[a]lthough the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me un-

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52. *Id.* at 20.

53. *Id.* at 20-21 (stating that "there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails'" (alterations in original) (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967))); *see also infra* note 60 (discussing United States v. Robinson, 414 U.S. 218 (1973), and its reiteration of the Court's reasonableness standard). The Court further stated that in justifying the intrusion, an officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21 (footnote omitted). This balancing of interests, the Court stated, must be conducted by a judge, who can determine whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.* at 21-22 (citations omitted).

54. 392 U.S. 40 (1968).

55. *Id.* at 67. Because *Sibron* was decided on the same day as *Terry*, this statement is quite important. The statement indicated that regardless of the newly recognized seizure versus arrest dichotomy, curtailing the movement of a suspect on the basis of probable cause to arrest constitutes an arrest. In reaching this conclusion, the Court cited *Henry v. United States*, 361 U.S. 98, 103 (1959), in which the Court stated that when police officers "interrupted . . . two men and restricted their liberty of movement, the arrest . . . was complete." *Id.* at 103.

56. *Sibron*, 392 U.S. at 67.

> til afterwards . . . . [A]n officer who does have probable cause may of course seize and search immediately.[57]

The Court created a new twist in its search incident to an arrest doctrine in *United States v. Robinson*,[58] where it seemingly limited the right of a police officer to conduct a search incident to an arrest to circumstances where a "lawful *custodial* arrest" occurred.[59] The *Robinson* Court recognized that a search incident to a noncustodial arrest or a search incident to the issuance of a notice of violation may be an issue for consideration, but it explicitly refused to consider whether this would be permissible under the Fourth Amendment.[60] By expressly adopting a standard whereby only those searches conducted incident to "custodial arrests" were constitutional, and by refusing to consider whether searches incident to noncustodial arrests violated the Fourth Amendment, the Court continued to be elusive in articu-

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57. *Id.* at 77 (Harlan, J., concurring). A similar position on this issue was espoused by Justice Traynor, former justice on the Supreme Court of California, who stated:

> if [an] officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested . . . there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested.

People v. Simon, 290 P.2d 531, 533 (Cal. 1955) (en banc).

58. 414 U.S. 218 (1973).

59. *Id.* at 235 (emphasis added) ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."). While never explicitly defining what constitutes a "custodial" arrest, the Court justified its holding by stating that

> [i]t is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.

Id. at 234-35. In *Gustafson v. Florida*, 414 U.S. 260 (1973), decided on the same day as *Robinson*, the Court further clarified its search incident to arrest doctrine by stating that police officers have the absolute right to conduct a search incident to an arrest regardless of whether police regulations *require* an officer to make an arrest for a given crime. *See Gustafson*, 414 U.S. at 265 ("Though the officer here was not required to take the petitioner into custody by police regulations as he was in *Robinson* . . . [i]t is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody.").

60. *Robinson*, 414 U.S. at 236 n.6. The Court stated that

> [t]he opinion of the Court of Appeals also discussed its understanding of the law where the police officer makes what the court characterized as 'a routine traffic stop' . . . . Since in this case the officer did make a full-custody arrest of the violator, we do not reach the question discussed by the Court of Appeals.

Id.

lating precisely when an officer has the ability to conduct a search incident to an arrest.

But while choosing to defer the consideration of whether officers could conduct searches incident to noncustodial arrests, the Court may have provided two glimpses into its views regarding the constitutionality of these searches. First, the Court continued to stand behind its previous statements that the justification for allowing police to conduct a search incident to a custodial arrest "rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial."[61] Presumably, this would be the standard used to judge searches incident to noncustodial, as well as custodial arrests. Second, the Court also hinted, through its citation of Judge Cardozo's expansive reading of the search incident to an arrest doctrine in *People v. Chiagles*,[62] that it might be willing to extend the reach of the search incident to an arrest doctrine beyond mere custodial arrests.[63] In *Chiagles*, Judge Cardozo wrote:

> Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for arrest or accusation . . . [a] search . . . becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.[64]

Seven years after deciding *Robinson*, the Court extended the reach of its search incident to an arrest doctrine in *Rawlings v. Ken-*

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61. *Id.* at 234 (citing Angello v. United States, 269 U.S. 20 (1925); Abel v. United States, 362 U.S. 217 (1960)).

62. 142 N.E. 583 (N.Y. 1923).

63. *Robinson*, 414 U.S. at 232.

64. *Chiagles*, 142 N.E. at 584; *see also Robinson*, 414 U.S. at 232 (quoting *Chiagles*). At least one jurisdiction has interpreted *Robinson* to mean that a trip to the station house is not a required element of an arrest for Fourth Amendment purposes to justify conducting a search incident to an arrest. *See* People v. Bland, 884 P.2d 312, 321 (Colo. 1994) (en banc) (explaining that "in the context of a non-custodial arrest, the arresting officer is entitled . . . [to] search for instrumentalities or evidence of the specific crime for which the officer had probable cause to make the arrest"). Professor LaFave similarly states that "[t]he need to search for evidence . . . is not related at all to the need for or fact of continued custody of the arrestee, and thus under the better view such a search is no less lawful when incident to an arrest not of a 'custodial' nature." 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.2(h), at 99 (3d ed. 1996). The Supreme Court itself seemed willing to allow searches incident to "noncustodial" arrests, stating, in dicta, that "[a]n arrested person is not invariably taken to a police station or confined; if an arrestee is taken to the police station, that is no more than a continuation of the custody inherent in the arrest status." Illinois v. Lafayette, 462 U.S. 640, 645 (1983).

tucky[65] by stating that the search incident to an arrest doctrine could be applied to cases where a search was conducted by an officer *prior* to making a formal arrest.[66] In reaching this conclusion, the Court stated that when an officer has probable cause to place a suspect under arrest and "[w]here the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa."[67] *Rawlings* indicated the Court's willingness to break from the strict "custodial arrest" requirement of *Robinson*, and demonstrated that the Court would be willing to bend the formal rules of the search incident to an arrest doctrine, provided that probable cause to arrest exists prior to the initiation of a search.

Finally, in *California v. Hodari D.*,[68] the Court began to clearly define the requirements of an arrest, stating that an arrest requires "*either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."[69] The Court again demonstrated the differing requirements for arrest and seizure, however, stating that a seizure requires "not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control. . . . [while an arrest only requires] the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee . . . ."[70] While *Hodari D.* certainly

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65. 448 U.S. 98 (1980).

66. *Id.* at 111.

67. *Id.* (citations omitted). Throughout the late 1980s and 1990s, Maryland courts used the *Rawlings* decision to justify loosening state search incident to arrest requirements. *Compare* Bouldin v. State, 276 Md. 511, 515, 350 A.2d 130, 132 (1976) (stating that "[i]t is axiomatic that when the State seeks to justify a warrantless search incident to arrest, it must show that the arrest was lawfully made prior to the search"), *with* Lee v. State, 311 Md. 642, 668, 537 A.2d 235, 247-48 (1988) (explaining that conducting a search prior to formal arrest does not prevent analyzing the search under the principles governing searches incident to a valid arrest, because at the time of the search there was probable cause to make the arrest).

68. 499 U.S. 621 (1991).

69. *Id.* at 626. The majority further stated that

> [m]ere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest without either touching or submission.

Id. at 626-27 (alteration in original) (internal quotation marks omitted) (quoting Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940)).

70. *Id.* at 624. In reaching this conclusion, the majority cited a search and seizure treatise, which states that

> [t]here can be constructive detention, which will constitute an arrest, although the party is never actually brought within the physical control of the party making an arrest. This is accomplished by merely touching, however slightly, the body of

provides the first clear definition of how the Court would define an arrest, the lingering and mysterious "custodial arrest" requirement of *Robinson* precluded courts from merely applying the *Hodari D.* arrest definition to determine whether an officer had the Fourth Amendment right to conduct a search incident to an arrest.

(4) Eliminating the Arrest Requirement from the Search Incident to an Arrest Doctrine?.—In *Cupp v. Murphy*,[71] the Court cited the *Chimel* search incident to an arrest exception to the warrant requirement as support for its decision to allow police officers to conduct limited searches incident to a detention when the search is limited to finding "highly evanescent evidence."[72] The Court stated that when there is a detainment but no formal arrest, a suspect is "sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy what evidence he could without attracting further attention."[73] The rationale of *Chimel*, therefore, justified the Court's determination that, in some instances, a mere detention could trigger the right to conduct a "very limited search necessary to preserve . . . highly evanescent evidence."[74] Although the Court never defined what constitutes "highly evanescent evidence," it found that "considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence," the search did not violate the Fourth Amendment.[75]

> the accused, by the party making the arrest and for that purpose, although he does not succeed in stopping or holding him even for an instant . . . .

Id. at 625 (citing A. CORNELIUS, SEARCH AND SEIZURE 163-64 (2d ed. 1930)).

71. 412 U.S. 291 (1973).

72. *Id.* at 295-96. While the Court admitted that *Chimel* merely recognizes an exception to the warrant requirement to allow searches incident to valid arrests, it justified the broad reading of this case by stating that *Chimel* stands for the principal that "the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement." *Id.* at 295 (footnote omitted).

73. *Id.* at 296.

74. *Id.* In *Cupp*, a murder suspect refused to consent to the taking of fingernail scrapings in connection with a murder investigation. *Id.* After refusing the scrapings, the suspect "put his hands behind his back and appeared to rub them together. He then put his hands in his pockets, and a 'metallic sound, such as keys or change rattling' was heard." *Id.* Subsequently, "[u]nder protest and without a warrant, the police proceeded to trace the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown." *Id.* at 292.

75. *Id.* Professors LaFave and Israel stated that many lower court cases support a broader but sound rule:

> [A] warrantless search is proper if the officer had probable cause to believe that a crime had been committed and probable cause to believe that evidence of the crime would be found and that an immediate, warrantless search was necessary in order to prevent the destruction or loss of evidence.

b. Maryland's Arrest Requirements.—The Court of Appeals first defined what constitutes an arrest in *Cornish v. State*,[76] where it stated that "this Court has built a working definition of an arrest—the detention of a known or suspected offender for the purpose of prosecuting him for a crime."[77] A detention, the court stated, occurs only "when there is a touching by the arrestor, although some cases have found a detention where there was no touching but the offender, upon being told that he was under arrest, submitted."[78] Therefore, the analysis developed by the court in 1957 indicated that when determining what constitutes an arrest, a Maryland court must consider: (1) whether an officer detained a known or suspected offender, and (2) whether the officer detained the offender for the purpose of prosecuting him for a crime. But after articulating this definition, the court never considered whether the arrest was made for the purpose of prosecuting the offender for a crime.

In the cases of *Barnhard v. State*,[79] *Little v. State*,[80] *Bouldin v. State*,[81] and *McChan v. State*,[82] the Court of Appeals applied the exact same definition of arrest as it applied in *Cornish*.[83] But while each of these

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WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.5(d), at 178 (2d ed. 1992). Since the 1973 decision, Maryland courts have used *Cupp* to broaden the rights of Maryland police officers searching for "highly evanescent" evidence. In *Franklin v. State*, 18 Md. App. 651, 308 A.2d 752 (1973), for example, the Maryland Court of Special Appeals found that the seizure of the boxer shorts of a rape suspect to test for seminal stains was valid, provided that there was probable cause to arrest. *Franklin*, 18 Md. App. at 668, 308 A.2d at 763. Referring to this as the "search incident to a detention, based upon probable cause but not amounting to arrest, for readily destructible evidence" exception to the warrant requirement, *id.* at 666, the court found that even though the temporary detention amounted to less than a formal arrest, the seizure of the suspect's boxer shorts were valid. *Id.* at 668-69, 308 A.2d 763. The *Cupp* exception was also used by the Court of Special Appeals in *Anderson v. State*, 78 Md. App. 471, 553 A.2d 1296 (1989), where it found that "[t]he only exemption from the requirement that the probable cause for arrest be consummated by an actual arrest is the case where extraordinary steps have to be taken to prevent the destruction of 'highly evanescent evidence.'" *Anderson*, 78 Md. App. at 481 n.1, 553 A.2d at 1301 n.1 (citations omitted); *see also* Venner v. State, 30 Md. App. 599, 625, 354 A.2d 483, 497-98 (1976) (citing *Cupp* as a case that upheld the validity of a search involving a "borderline intrusion into the body"); Mills v. State, 28 Md. App. 300, 307, 345 A.2d 127, 131-32 (1975) (noting that blood tests to determine blood type do not fall within the exception to the warrant requirement for "highly evanescent evidence").

76. 215 Md. 64, 137 A.2d 170 (1957).

77. *Id.* at 67-68, 137 A.2d at 172.

78. *Id.* at 68, 137 A.2d at 172.

79. 325 Md. 602, 602 A.2d 701 (1992).

80. 300 Md. 485, 479 A.2d 903 (1984).

81. 276 Md. 511, 350 A.2d 130 (1976).

82. 238 Md. 149, 207 A.2d 632 (1965).

83. *See Barnhard*, 325 Md. at 611, 602 A.2d at 705 (applying the *Cornish* definition of arrest); *Little*, 300 Md. at 509-10, 479 A.2d at 915 (same); *Bouldin*, 276 Md. at 516, 350 A.2d at 133 (same); *McChan*, 238 Md. at 157, 207 A.2d at 638 (same).

cases reiterated the court's statement in *Cornish* that "[a]n arrest has been defined as 'the detention of a known or suspected offender for the purpose of prosecuting him for a crime,'"[84] none of these cases considered whether an intent to prosecute existed at the time of arrest. Each case limited its consideration of whether a valid arrest had been made to the determination of whether a police officer detained a known or suspected offender.[85]

Beginning with *Bouldin*, the Court of Appeals began to discuss alternative definitions of arrest, but it would always attach these alternative definitions to its traditional definition of arrest, as articulated in *Cornish* and *McChan*.[86] Although the Court of Appeals continued to give passing acknowledgment to the traditional intent to prosecute language, *Bouldin* opened the door for a covert rewriting of what constitutes an arrest under Maryland law. This intent to rewrite the definition of arrest is best demonstrated in *Morton v. State*,[87] decided only three years after *Bouldin*, where the Court of Appeals seemed to latch onto its alternative definitions of arrest, as articulated in *Bouldin*, stating that "an arrest is the taking, seizing or detaining of the person of another, *inter alia*, by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the

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84. *See supra* note 83.

85. *See Barnhard*, 325 Md. at 611-12, 602 A.2d at 706 (focusing on the defendant's intent to submit when determining whether an arrest had been made); *Little*, 300 Md. at 511, 479 A.2d at 916 (finding that the brief detention of a motorist at a sobriety checkpoint is not at arrest); *Bouldin*, 276 Md. at 519, 350 A.2d at 135 (concluding that an unconscious person was not "arrested" where the police did not "show the requisite police restraint or control"); *McChan*, 238 Md. at 157, 207 A.2d at 638 (focusing on the physical elements in defining arrest).

86. In *Bouldin*, for example, prior to reiterating Maryland's traditional definition of arrest, as articulated in *Cornish* and *McChan*, the court stated:

> It is generally recognized that an arrest is the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested.

276 Md. at 515-16, 350 A.2d at 133 (citing 5 AM. JUR. 2D *Arrest* § 1 (1962)). Further complicating matters, the court also stated that "[i]t is said that four elements must ordinarily coalesce to constitute a legal arrest: (1) an intent to arrest; (2) under a real or pretended authority; (3) accompanied by a seizure or detention of the person; and (4) which is understood by the person arrested." *Id.* at 516, 350 A.2d at 133 (citing 6A C.J.S. *Arrest* § 42 (1975); CREAMER, THE LAW OF ARREST, SEARCH AND SEIZURE ch. 3, at 49 (1968)). Although neither of these definitions incorporated an intent to prosecute requirement, after putting forth these two general definitions of arrest, the court reverted back to the traditional definition of arrest, as applied in *Cornish* and *McChan*. *See id.*

87. 284 Md. 526, 397 A.2d 1385 (1979).

person making the arrest."[88] Therefore, as of 1979, the court had gone from including intent to prosecute language, but never enforcing the requirement, to eliminating the intent to prosecute language altogether.

After the court decided *Morton*, it brought back the intent to prosecute language in *Little v. State*[89] and *Barnhard v. State*,[90] and again coupled the traditional intent to prosecute language with the other definitions of arrest articulated in *Bouldin*.[91] But as the court had done since its development of the traditional definition of arrest in *Cornish*, it never actually applied the intent to prosecute language to the cases under its consideration.

3. The Court's Reasoning.—In *State v. Evans*,[92] the Court of Appeals considered two issues: (1) whether the police encounter with Evans constituted an arrest under Maryland law and (2) whether the search of Evans was justifiable under the search incident to arrest exception to the warrant requirement of the Fourth Amendment.[93] The Court of Appeals first held that the detention of Evans constituted a valid arrest under Maryland law.[94] Defining what constitutes an arrest in Maryland, Judge Raker, writing for the court, stated that while at least five Maryland cases have stated that an arrest requires the detention of "a known or suspected offender *for the purposes of prosecuting him for a crime*,"[95] this language is merely "gratuitous,"[96] and the Court of Appeals has "never *held* that a valid arrest in Maryland requires of the arresting officer an intent to prosecute the arrestee for the crime believed to have been committed."[97] Instead, the court held that to exe-

88. *Id.* at 530, 397 A.2d at 1388. This effectively eliminated the de jure intent to prosecute requirement, which had never actually been enforced since its creation in *Cornish*.

89. 300 Md. 485, 479 A.2d 903 (1984).

90. 325 Md. 602, 602 A.2d 701 (1992).

91. *See id.* at 611, 602 A.2d at 705 (discussing the components of an arrest and indicating that the intent to prosecute is one of those components); *Little*, 300 Md. at 509-10, 479 A.2d at 915 (same).

92. 352 Md. 496, 723 A.2d 423 (1999).

93. *Id.* at 511, 723 A.2d at 430.

94. *Id.* at 515, 723 A.2d at 432.

95. *Id.* at 513, 723 A.2d at 431 (alteration in original) (internal quotation marks omitted) (quoting Bouldin v. State, 276 Md. 511, 516, 350 A.2d 130, 133 (1976)).

96. *Id.*

97. *Id.* at 514, 723 A.2d at 431. Interestingly, the court explained that the intent to prosecute language, which originally appeared in *Cornish*, was derived from "an uncited source." *Id.* at 513 n.13, 723 A.2d at 431 n.13. Because the intent to prosecute language was taken from this uncited source, David Kauffman's *The Law of Arrest in Maryland*, the court stated that "[t]his proposition, and its recitation, are thus of questionable pedigree." *Id.* (citing David Kauffman, *The Law of Arrest in Maryland*, 5 MD. L. REV. 125 (1941)). The court further supported its decision to eliminate the intent to prosecute language by point-

cute a lawful arrest in Maryland "a police officer must have probable cause to believe the suspect has committed a felony and must either physically restrain the suspect or otherwise subject the suspect to his or her custody and control."[98] Applying this definition of arrest to the case at hand, the court found that because the "identification team" had probable cause to arrest Evans and because they subjected him to police custody and control, the initial detention constituted a valid arrest under Maryland law.[99]

The Court of Appeals next considered whether its definition of an arrest comported with the Fourth Amendment and the search incident to an arrest doctrine, as defined by the Supreme Court.[100] Exploring the limitations placed on the search incident to an arrest doctrine by the Supreme Court, the court found that because the purpose of creating the search incident to an arrest doctrine was to allow an arresting officer to remove weapons on the arrestee and search for evidence to prevent its concealment and destruction,[101] "the sole prerequisite for application of the 'search incident to lawful arrest' exception is the existence of a lawful arrest."[102] The court initially stated that the validity of an arrest is determined by state law[103] and that Maryland has "long recognized the right of a police officer to make a full search of an arrestee incident to that arrest."[104] Therefore, "Mary-

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ing out that in Maryland, police officers ordinarily have no authority to prosecute, and that police cannot make the determination of whether to prosecute or not. *Id.* at 514 n.14, 723 A.2d at 431 n.14.

98. *Id.* at 515, 723 A.2d at 432. In so holding, the court also rejected the argument that "failure of the police to initiate the formal criminal charging process at or near the time of the initial detention precludes a valid arrest under Maryland law," stating that "formally charging a suspect is not a *sine qua non* to a lawful arrest in Maryland." *Id.*

99. *See id.* ("It is thus beyond question that the initial detentions of Respondents rose to the level of either a physical restraint or a subjugation to police custody and control."). While discussing what constitutes an arrest under Maryland law, the Court of Appeals supported its application of the search incident to an arrest doctrine to a nonformal or "non-custodial" arrest by citing *United States v. Hernandez*, 825 F.2d 846 (5th Cir. 1987), where the Fifth Circuit Court of Appeals held that "[a] custodial arrest based on probable cause is a reasonable intrusion under the fourth amendment whether the arrest is de facto or formal." 352 Md. at 515-16, 723 A.2d at 432 (quoting *Hernandez*, 825 F.2d at 852).

100. *Id.* at 519-20, 723 A.2d at 434-35.

101. *Id.* at 517, 723 A.2d at 433.

102. *Id.* at 518, 723 A.2d at 433. While recognizing that the standard articulated in *Robinson* required a "custodial arrest of a suspect based on probable cause" before allowing an officer to conduct a search incident to an arrest, the court chose to follow the Supreme Court's opinion in *Michigan v. DeFillipo*, 443 U.S. 31 (1979), where it stated that "[t]he fact of a lawful arrest, standing alone, authorizes a search." *Evans*, 352 Md. at 518, 723 A.2d at 433 (quoting *DeFillipo*, 443 U.S. at 35).

103. *Id.* at 518, 723 A.2d at 433 (citations omitted).

104. *Id.*

land law should be dispositive of the search incident issue."[105] But the court hedged its statement a bit, admitting that "[d]espite the robust proclamations we earlier quoted from *Robinson* and *DeFillippo* . . . what suffices as an arrest under the law of this State may not incorporate the necessary justifications and requirements under the Fourth Amendment."[106] The Court of Appeals then considered the Supreme Court's decision in *Knowles v. Iowa*,[107] where the Court rejected the idea that probable cause to arrest, without more, is sufficient to justify using the warrantless search incident to an arrest exception to the warrant requirement.[108] Rejecting any analogies between *Evans* and *Knowles*, the Court of Appeals stated that the Supreme Court refused to extend the search incident to an arrest exception to the issuance of a citation in *Knowles* because (1) the Supreme Court, in *Knowles*, found no need to disarm a suspect or preserve evidence when no arrest was going to be made and (2) because in *Knowles* there was no actual arrest.[109] The case at hand differs from *Knowles*, the court found, because of the "inherent danger of drug enforcement"[110] and the "threat to valuable evidence" present at the time of arrest.[111] Further, "adopting the requirement of formal processing of detained suspects as a constitutional prerequisite to a valid arrest would not be in concert with the principles espoused by the Fourth Amendment."[112] The court then held that the "failure of the Baltimore City Police to subject Evans . . . to the formal criminal charging process at the time

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105. *Id.* at 519, 723 A.2d at 434. The court noted, in passing, that "Maryland law . . . coincide[s] with the permissible scope of a search incident to an arrest," as expressed in *Chimel v. California*. *Id.* at 518, 723 A.2d at 434.

106. *Id.* at 519-20, 723 A.2d at 434.

107. 525 U.S. 113 (1998).

108. *Evans*, 352 Md. at 520, 723 A.2d at 434-35; *see also Knowles*, 525 U.S. 113, 115-16 (1998) (rejecting the Iowa Supreme Court's decision that "so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest").

109. *Evans*, 352 Md. at 520-22, 723 A.2d at 435-36. The Court of Appeals recognized that because the second justification for the search incident rule is

> "the need to discover and preserve evidence . . . necessary to prosecute [the] offense;" . . . it might be argued that a prerequisite to a constitutionally permissible search incident is the existence of an intent by the arresting officers to prosecute. If such be the case, the requirement was fulfilled in the present case[ ].

Id. at 520 n.17, 723 A.2d at 435 n.17 (first two alterations in original) (quoting *Knowles*, 525 U.S. at 118).

110. *Id.* at 522, 723 A.2d at 435. Although the officers did not transport Evans to the station house, "the arrest itself [is] fraught with danger for the police officers involved." *Id.* at 523, 723 A.2d at 436.

111. *Id.* at 523, 723 A.2d at 436. The Court of Appeals stated that "it is indisputable that had [Evans] simply been released after [his] identification was secured, the police would have lost valuable evidence of the crimes for which [he was] arrested." *Id.*

112. *Id.* at 528, 723 A.2d at 438.

of [his] valid arrest[ ] under Maryland law did not offend the United States Constitution."[113]

4. Analysis.—By holding that police may conduct a search incident to the arrest of a suspect who is not taken to the station house for booking, the Court of Appeals pushed the Supreme Court's search incident to an arrest doctrine to its brink. In so doing, however, the Court of Appeals logically extended an established exception to the warrant requirement to include a police practice that is, in most cases, reasonable under the Fourth Amendment.[114] Additionally, in considering what constitutes an arrest under Maryland law, the Court of Appeals formally eliminated an element of arrest that had never been followed since the court first defined "arrest" in 1957.[115] In so doing, the court aligned Maryland's arrest requirements with those adopted by the Supreme Court.

To determine whether the Court of Appeals was justified in reaching its conclusions, three questions must be answered: (1) did the detainment of Evans constitute an arrest under the Fourth Amendment; (2) what did the Supreme Court mean when it stated that searches may only be made incident to "custodial" arrests—and along the same line, did the seizure of Evans amount to a custodial arrest; and (3) did the seizure of Evans constitute a valid arrest under Maryland law.

a. Defining "Arrest" Under the Fourth Amendment.—The Court of Appeals was correct in determining that the detainment of Evans constituted an arrest under the Fourth Amendment as defined in *Sibron v. New York*[116] and *California v. Hodari D.*[117] First, in *Sibron*, the Court defined the precise point when an officer's engagement with a suspect reaches the point of an arrest, stating that "[w]hen the policeman grabbed Peters by the collar, he abruptly 'seized' him and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity. . . . At that point he had the authority to search Peters."[118] Following the *Sibron* logic, the

113. *Id.* at 530, 723 A.2d at 439.

114. *See supra* Part 2.b (discussing the Supreme Court's "reasonableness" standard for search incident to an arrest).

115. *See supra* Part 2.e (discussing Maryland's arrest requirements).

116. 392 U.S. 40 (1968); *see also supra* notes 54-57 and accompanying text (summarizing the Court's *Sibron* decision).

117. 499 U.S. 621 (1991); *see also supra* notes 68-70 and accompanying text (summarizing the Court's *Hodari D.* decision).

118. *Sibron*, 392 U.S. at 67.

only issue for consideration in the *Evans* case, for Fourth Amendment purposes, was whether Evans was seized by the police officers, thus curtailing his freedom of movement and giving the officers the authority to conduct a search. Because there is no doubt that the police detainment of Evans constituted a seizure and that the seizure was made based on probable cause,[119] the court accurately concluded that the detainment constituted a valid arrest under the Court's *Sibron* logic.

Evans's detainment also constituted an arrest under the definition of arrest articulated by the Court in *California v. Hodari D.*[120] In *Hodari D.*, the Court stated that an arrest requires "*either* physical force . . . or, where that is absent, *submission* to the assertion of authority."[121] The Court continued to state that "[m]ere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential."[122] Under this definition, the Court of Appeals was well within its right to find that the detention of Evans constituted an arrest under the Fourth Amendment. Any police detainment requires either (1) the exertion of physical force by police officers in order to ensure that the detainee does not flee, or (2) submission of the detainee to the authority of the police.[123] While the record does not state whether there was an exertion of physical force or a submission by Evans, the record indicates that the seizure of Evans "was a detention and the Defendant was not free to go until [the police] secured his identification."[124] Because Evans was detained by police, and because this detainment would have required *either* the exertion of physical force by members of the identification team, or a submission by Evans to the

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119. *See Evans*, 352 Md. at 515, 723 A.2d at 432 ("It is thus beyond question that the initial detentions of Respondents rose to the level of either a physical restraint or a subjugation to police custody and control."). Even the Court of Special Appeals acknowledged this fact, stating that "[the State] argues that when the police stopped the appellant, photographed him, searched him, and interrogated him that evening, there was, for Fourth Amendment purposes, a seizure of the person. We completely agree." Evans v. State, 113 Md. App. 347, 356, 688 A.2d 28, 33 (1997).

120. 499 U.S. 621 (1991).

121. *Id.* at 626 (alterations in original). The Court defined seizure as "a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.*

122. *Id.* (quoting Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940)).

123. *See Evans*, 352 Md. at 515, 723 A.2d at 432 (requiring either physical restraint or police custody and control to constitute a lawful arrest).

124. Joint Record Extract at E.44, State v. Evans, 352 Md. 496, 723 A.2d 423 (1999) (No. 28).

search itself, the detention constituted an arrest under the Fourth Amendment.[125]

b. Application of the "Custodial Arrest" Requirement to the Search Incident to an Arrest Doctrine.—While the Court of Appeals acknowledged that police officers gain the right to conduct a search incident to an arrest from *Chimel v. California*,[126] it pointed out that the threshold that must be met prior to conducting a search incident to an arrest was clarified in *United States v. Robinson*.[127] In *Robinson*, the Court stated that "[a] *custodial* arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."[128] The Court of Appeals attempted to ignore the "custodial" requirement of *Robinson* and justified this by citing *Michigan v. DeFillippo*,[129] where the Court stated that "[t]he fact of a lawful arrest, standing alone, authorizes a search."[130] This resolution of the "custodial" quagmire is a bit hasty for two reasons. First, the Court's statement in *DeFillippo* was intended to clarify its assertion that the validity of a search incident to an arrest does not depend on whether the arrested person possesses weapons or evidence.[131] Second, this statement could not be intended to eliminate the "custodial" requirement of *Robinson*, because *Robinson* was cited as authority for the statement itself.[132] Therefore, a more thorough inquiry must be made into the Court's intent in requiring a custodial arrest.[133]

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125. Although the detention fulfilled Fourth Amendment requirements for an arrest, it did not necessarily meet Maryland's definition of arrest. *See infra* notes 156-166 and accompanying text (discussing the court's application of the Maryland arrest requirements in *Evans*).

126. 395 U.S. 752 (1969); *see also supra* notes 43-47 and accompanying text (discussing *Chimel*).

127. *Evans*, 352 Md. at 517-18, 723 A.2d at 433.

128. United States v. Robinson, 414 U.S. 218, 235 (1973) (emphasis added).

129. 443 U.S. 31 (1979).

130. *DeFillipo*, 443 U.S. at 35; *see Evans*, 352 Md. at 518, 723 A.2d at 433 (quoting *DeFillipo*).

131. *See DeFillipo*, 443 U.S. at 35 ("The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.").

132. *See id.* (citing *Robinson* as support for the Court's statement).

133. Unfortunately, the Court of Appeals of Maryland went no further in its analysis of *Robinson* than recognizing that the term "custodial" is attached to the term "arrest" for the purposes of applying the search incident to an arrest exception to the warrant requirement. *See Evans*, 352 Md. at 517-18, 723 A.2d at 433. After acknowledging that the Supreme Court developed a bright-line rule in *Robinson* for determining the reasonableness of searches conducted incident to arrests, *see id.* at 517, 723 A.2d at 433, and after quoting the Court's statement that "[a] custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment," *id.* (quoting *Robinson*, 414 U.S. at

Rather than passing on this issue altogether, it would have been much more responsible and would have made for better jurisprudence, had the Court of Appeals looked to the history of the search incident to an arrest doctrine to determine the meaning of the term "custodial arrest" before reaching its conclusion that the Baltimore City Police Department Violent Crimes Task Force had the right to conduct a full search incident to a noncustodial arrest. But unlike grade school math, where students are required to demonstrate how they arrived at their answer to get full credit, the Court of Appeals can receive full credit for reaching the correct result, even though it did so without applying the proper analysis.

In analyzing this question, the court should have made an inquiry into the constitutional permissibility of a search incident to a noncustodial arrest by considering the Supreme Court's justification for allowing searches incident to custodial arrests. In explaining the need to search a suspect prior to taking him into custody, the Court has stated that

> the danger to [a police] officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.[134]

Considering the definition of "custodial" in the context of this statement requires courts to determine what impact the word "and" should play in the phrase "taking of a suspect into custody *and* transporting him to the police station."[135] This passage could reinforce the notion that a custodial arrest only requires that an actual arrest be made, because the Court's allusion to transporting an arrestee to the police station could be considered to be separate from the act of making a custodial arrest.[136] But because the Court stated that the danger

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235), the Court of Appeals concluded that "[i]t might thus be stated that the sole prerequisite for application of the 'search incident to lawful arrest' exception is the existence of a lawful arrest." *Id.* at 518, 723 A.2d at 433.

134. *Robinson*, 414 U.S. at 234-35.

135. *Id.* (emphasis added).

136. *See id.* at 234 n.5. In this footnote, the *Robinson* Court noted that "[d]anger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty." *Id.* Thus, the Court conceded that the danger may occur well before transport to the police station. This interpretation of "custodial" was reinforced by the Court in *Illinois v. Lafayette*, 462 U.S. 640 (1983), where it stated that "[a]n arrested person is not invariably taken to a police station or confined; if an arrestee is taken to the police station,

to an officer is increased due to the "extended exposure" of a custodial arrest, the Court likely believed that the right to conduct a search incident to an arrest stems from the inherent danger an officer is exposed to when transporting an arrestee to the station house.[137]

The next logical step in interpreting the meaning of "custodial arrest," applying the *Robinson* justifications for allowing police to conduct searches incident to valid arrests, also does not resolve the issue of whether the search in *Evans* was permissible. The Supreme Court based the search incident to an arrest exception to the warrant requirement on "the need to disarm the suspect in order to take him into custody . . . [and] the need to preserve evidence on his person for later use at trial."[138] Contrary to the Court of Appeals's finding that the search of Evans met these two justifications,[139] the search itself only met one of the two justifications for conducting a search incident to an arrest. The Court of Appeals was certainly correct in finding that the search of Evans was justified by the need to preserve evidence, because once Officer Rowell purchased drugs from Evans and confirmed his identity, there was clearly a need to obtain and preserve the illegal narcotics and marked money on Evans's person as evidence for later prosecution.[140] But it does not follow that simply because there is an inherent danger in drug enforcement, the need to disarm a suspect to take him into custody is automatically triggered. For as the Court noted in *Robinson*, the danger to police officers inherent in custodial arrests rises from taking the suspect into custody *and transport-*

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that is no more than a continuation of the custody inherent in the arrest status." *Lafayette*, 462 U.S. at 645. But if this definition of custodial arrest is correct, then conceivably every arrest would constitute a custodial arrest and there would have been no need for the *Robinson* Court to even use the term "custodial" in the context of defining when a search incident to an arrest is permissible.

137. *See Robinson*, 414 U.S. at 234-35. In *Robinson*, the Court stated:

> It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.

Id.

138. *Id.* at 234; *see also* Chimel v. California, 395 U.S. 752, 763 (1969) (explaining that the search incident to an arrest is aimed at protecting officer safety and preventing the destruction of evidence).

139. The court stated that "the arrest[ ] of Evans . . . for drug trafficking incorporated both of the historical justifications for conducting a full search incident: the safety of the arresting officers as well as the need to discover and preserve evidence." *Evans*, 352 Md. at 522, 723 A.2d at 435.

140. As the Court of Appeals stated, the prosecution of Evans would have been severely weakened "without recovery of the marked money and additional drugs." *Id.* at 523, 723 A.2d at 436.

ing him to the station house, rather than from simply dealing with a criminal element.[141] If the danger to police officers stems from the prolonged exposure to a suspect once a custodial arrest is made, as the Court states in *Robinson,* the fact that the suspect was not taken to the police station for questioning or booking would seem to be quite relevant to the determination of whether the second justification for allowing a search incident to an arrest applies to this case.[142]

Although an analysis of the justifications for conducting a search incident to an arrest does not lead to a clear answer, the Supreme Court's decision in *Cupp v. Murphy*[143] supports the conclusion of the Court of Appeals that the Fourth Amendment allows police officers to conduct searches incident to noncustodial arrests.[144] In *Cupp,* the Court extended the search incident to an arrest doctrine beyond the scope of *Chimel* to include searches incident to mere detentions, in certain circumstances.[145] The Court stated that because *Chimel* is based on the premise that it is "reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession,"[146] the search incident to an arrest exception to the warrant requirement can be extended beyond arrests to include searches incident to detentions when the search is intended to "preserve . . . highly evanescent evidence."[147] Therefore, even if the Court intended in *Chimel* and in

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141. *Robinson,* 414 U.S. at 234-25. In *Terry v. Ohio,* 392 U.S. 1 (1968), the Court determined that when an officer reasonably believes that a person with whom he is dealing may be armed and dangerous, the officer has a right to conduct a "carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry,* 392 U.S. at 30. It would seem, therefore, that for mere street encounters, where there is no long-term custody involved—when the arrestee is not taken to the station house for booking or questioning—a *Terry*-stop-and-frisk would suffice to ensure officer safety. But even if the Court of Appeals was determined to conclude that the "need to disarm the suspect" justification of *Robinson* must be met to uphold the search of Evans, the court would have been better served basing the right to conduct a *full* search based on the extended detainment of Evans, rather than on the inherent danger in policing for drug offenses, since the inherent danger of policing was the Court's justification for allowing the lesser *Terry*-stop-and-frisk. *See id.* at 22-27 (discussing officer-safety as a justification for the stop-and-frisk).

142. *But see* Illinois v. Lafayette, 462 U.S. 640, 645 (1983) (suggesting that custody arises from the arrest status, and not necessarily from the trip to the station house).

143. 412 U.S. 291 (1973).

144. *See supra* notes 71-75 and accompanying text (discussing *Cupp*).

145. *See Cupp,* 412 U.S. at 296 (finding that a limited search incident to a defendant's voluntary detention is constitutionally permissible, based on the need to preserve evanescent evidence).

146. *Id.* at 295.

147. *Id.* at 296. The Court reached this conclusion even though *Chimel* limited the search incident to an arrest doctrine to include only those searches that are conducted incident to valid arrests. *Chimel,* 395 U.S. at 762-63. Implicit in the Court's *Cupp* decision is

Robinson to limit the search incident to an arrest doctrine to those arrests where the suspect is taken to the station house, the Court demonstrated in *Cupp* that the arrest requirement of the search incident to an arrest doctrine may not be followed rigorously when a prosecutor can demonstrate that a police search was reasonable.

Determining whether a search and seizure is reasonable, the Court has stated, requires an inquiry into "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[148] The Court has also stated that to determine reasonableness, a court should balance "the need to search [or seize] against the invasion which the search [or seizure] entails."[149]

If the Court of Appeals had applied this balancing test in *Evans*, many factors would weigh heavily in favor of the need to conduct the search incident to Evans's noncustodial arrests. As Officer Rowell stated, the practice of searching drug dealers without making a "formal" arrest and going through the traditional booking process was implemented by the police force "to protect the integrity of the ongoing undercover operation,"[150] which would allow the police to make a greater impact on the drug trade in individual communities.[151] The practice of making noncustodial arrests based on probable cause was a tactic undertaken by the Baltimore Police Department for the legitimate and reasonable purpose of attempting to ensure that their sting operation was not recognized in the targeted community. Further, both sides admit that the police had probable cause to arrest Evans.[152] Because the police had probable cause and because they limited the

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the idea that searches that do not fit the exact holding of *Chimel* may still be valid, provided that they meet the illusive "reasonableness" standard. *See Cupp*, 412 U.S. at 295 (explaining that "[t]he basis for [the *Chimel*] exception is that when an arrest is made, it is *reasonable* for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession" (emphasis added)). *See generally infra* notes 148-149 and accompanying text (discussing the Court's interpretation of the "reasonableness" standard).

148. Terry v. Ohio, 392 U.S. 1, 20 (1968).

149. *Id.* at 21 (alteration in original) (internal quotation marks omitted) (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)). In weighing these interests, a judge should ask whether the "facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.* at 21-22.

150. *Evans*, 352 Md. at 500, 723 A.2d at 425.

151. *See id.* at 500 n.1, 723 A.2d at 425 n.1 (noting that the goal of the operation was "to make an impact in the area").

152. *See id.* at 508, 723 A.2d at 429 ("Although he concedes the police had sufficient probable cause to arrest him at the time of the June 9, 1994 incident, Evans argues that the police did not in fact execute such an arrest pursuant to Maryland law.").

search to those items needed for prosecution—the drugs and the marked money—it was reasonable for the Court of Appeals to find that the police interest in obtaining the evidence needed to try to convict Evans is greater than the privacy interests of the drug dealer. Reaching an alternative conclusion would require the court to conclude that a probable cause-based search incident to a noncustodial arrest somehow intrudes more on the rights of the arrestee than a probable-caused based search that results in a formal arrest and a trip to the station house. The Court of Appeals countered this illogical argument quite effectively, quoting Judge Sonner's dissent for the Court of Special Appeals:

> Requiring the police to charge every person they detain and search forwards no valid public interest, much less any of the values that the Fourth Amendment's exclusionary rule is meant to protect. The violations of privacy or detention and search will already have occurred . . . . The Fourth Amendment protection against illegal searches and seizures and the privacy interest that the exclusionary rule is believed by some to protect will not, in any way, be serviced by attaching a further requirement that the police lodge a formal charge after they have searched.[153]

The only argument that could be made against allowing police to conduct searches incident to noncustodial arrests is that the privacy rights of suspects are violated when they are searched incident to noncustodial arrests. But this argument is not persuasive, because in order to conduct a search incident to a noncustodial arrest, police must still have probable cause to arrest. The only difference between a search incident to an arrest and a search incident to a noncustodial arrest is that in the latter case, the individual is not taken directly to the station house for booking, and is instead released. Because it would be unreasonable to argue that an individual's privacy rights may be violated when a probable cause-based search does not result in the individual being immediately booked and placed in jail, no individual privacy rights are at risk when police are permitted to conduct searches incident to noncustodial arrests.

Upon considering the totality of the Supreme Court's jurisprudence regarding the justification of the search incident to an arrest doctrine, notwithstanding the Court's ambiguous use of "custodial" in *Robinson*, it was reasonable for the Court of Appeals to find that the

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153. *Id.* at 528, 723 A.2d at 438-39 (quoting Evans v. State, 113 Md. App. 347, 378, 688 A.2d 28, 44 (1997) (Sonner, J., dissenting)).

Fourth Amendment does not prevent police officers from conducting searches incident to "noncustodial" arrests. While the Court of Appeals failed to analyze the meaning of the term "custodial arrest," and blindly adopted the view that "custodial arrest" and "arrest" are synonymous for purposes of applying the search incident to an arrest doctrine, the fact that one of the two justifications for conducting a search incident to an arrest is present in noncustodial arrests supported the court's conclusion.[154]

There may be certain circumstances, however, where a search incident to a noncustodial arrest is not appropriate. If an arrest is made that does not result in a trip to the station house, and the arresting officer does not need to search the arrestee to obtain evidence of the crime, then neither of the justifications for conducting a search incident to an arrest are present.[155] It is difficult to imagine many scenarios where this would occur, but it is worth noting that when neither of the *Robinson* justifications are met, police should not have the authority to conduct a search incident to a noncustodial arrest.

c. Defining Arrest Under Maryland Law.—Eliminating the intent to prosecute language from Maryland's definition of arrest, while running counter to the express language traditionally used by the court in defining what constitutes an arrest, fully comports with the de facto application of Maryland arrest law throughout the last forty-two years.[156] The court was correct when it stated in *Evans* that despite its history of using the intent to prosecute language, "neither [*Bouldin*] nor any other case decided by th[e] Court has rested upon the determination that an intent to prosecute is a prerequisite to a valid arrest."[157]

Eliminating this language from Maryland's arrest requirements was proper not only because the language had been ignored by the court, but also because it is impractical to apply. As the court correctly pointed out in *Evans*, police officers in Maryland have no authority to prosecute.[158] Because the "commencement of a Maryland

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154. *See supra* notes 138-142 and accompanying text (discussing the court's application of the two requirements to *Evans*).

155. *See supra* notes 134-138, 146-147 (discussing the justifications for conducting a search incident to an arrest).

156. *See supra* Part 2.e (discussing the court's failure to adhere to the intent to prosecute language).

157. *Evans*, 352 Md. at 514, 723 A.2d at 431.

158. *See id.* at 514 n.14, 723 A.2d at 431 n.14 (citing MD. CONST. art. V, §§ 3, 9 and MD. CODE ANN., STATE GOV'T §§ 9-1202 to -1207) (stating that prosecutorial authority lies with the Attorney General, the State's Attorneys, and the State Prosecutor).

prosecution lies in activities outside the scope of police authority, either with the courts . . . or with prosecutors,"[159] the intent to prosecute language was wholly unreasonable from its inception. The Court of Appeals's decision to eliminate the de jure intent to prosecute language was also wise because it virtually aligned Maryland's definition of arrest with that of the Supreme Court.[160] Making this change to the definition of arrest will allow Maryland police officers to take greater advantage of the search incident to an arrest exception to the warrant requirement, since they will not be forced to meet a higher arrest threshold under Maryland law than they are required to meet under the Fourth Amendment. Another benefit of altering the traditional definition of arrest is that the requirement of physically restraining a suspect or somehow subjecting a suspect to police custody or control is more objective than the vague intent to prosecute language traditionally used by the court. Furthermore, the new test will allow determinations of when an arrest occurs to be made by the courts, rather than by the subjective intent of individual police officers. Because there are a number of reasons that an officer may decide to arrest an individual without taking him to the station house for booking or taking affirmative steps that could be associated with an intent to prosecute,[161] requiring an intent to prosecute would unnecessarily prevent officers from conducting searches based on probable cause and pursuant to valid arrests.

Had the court decided not to alter the definition of arrest, it still could have held that the detainment of Evans constituted a valid arrest under the old definition of arrest.[162] Because the new standard of

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159. *Id.* (citations omitted).

160. *See supra* notes 68-70 (discussing *California v. Hodari D.*, 499 U.S. 621 (1991), in which the Court articulated its definition of arrest).

161. While it has already been demonstrated that an officer cannot possess an intent to prosecute when he has no authority to prosecute, there are also many instances where an officer, who has the authority to make a custodial arrest and a full search incident to the arrest, may decide that it would be in the best interests of law enforcement to only make a noncustodial arrest. The case at hand demonstrates one of the best justifications for allowing an officer to conduct a search based on a noncustodial arrest, where an officer arrests a suspect, but does not take him to the station house for booking. Professor LaFave has stated that an officer may choose to delay an arrest: (1) to conceal the identity of an informant, (2) to conceal another investigation, or (3) to prevent the dispersal of criminal activity. *See* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 220-25 (Frank J. Remington ed. 1965) (discussing examples of situations in which a person known to have committed a crime is not arrested in order to effectuate some other law enforcement purpose). In these circumstances, a court that follows the intent to prosecute language could, hypothetically, improperly correlate the noncustodial arrest with a lack of intent to prosecute.

162. *See supra* Part 2.e (discussing Maryland's pre-*Evans* arrest requirement).

arrest only requires that a police officer "have probable cause to believe the suspect has committed a felony and . . . either physically restrain the suspect or otherwise subject the suspect to his or her custody and control"[163] it is clear from the record that the police officers engaged in Operation Mid-East had met this standard with regard to their detention and search of Evans.[164] Although the old definition of arrest required another element, "the detention of a known or suspected offender for the purpose of prosecuting him for a crime,"[165] the Court of Appeals stated that an intent to prosecute actually existed at the time of Evans's arrest.[166] Therefore, while the elimination of one of the required elements of an arrest will certainly have a positive impact on policing by liberalizing the arrest requirement in Maryland, made no impact on the outcome of this case.

5. Conclusion.—Regardless of the shortcomings of the Court of Appeals's opinion in *State v. Evans*, the court ultimately made the proper decision regarding whether the detainment of Evans constituted a valid arrest under the Fourth Amendment and the laws of Maryland. While the Supreme Court has been elusive in defining the meaning of a custodial arrest, it has given an expansive reading to the search incident to an arrest exception to the warrant requirement. It is logical to conclude, therefore, that the only required element for a search incident to an arrest is that an actual arrest be made based on probable cause prior to or following quickly after the issuance of a valid arrest, provided that one of the *Robinson* justifications for conducting a search incident to an arrest is present.

The court also wisely made the decision to eliminate the intent to prosecute language from Maryland's arrest requirements. The intent to prosecute language had never actually been applied by the court, and had only been used as a meaningless garnish to its general arrest requirements. The court's decision to align Maryland's definition of arrest with the standard of arrest articulated by the Supreme Court

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163. *Evans*, 352 Md. at 515, 723 A.2d at 432.

164. *See id.* at 501-02, 723 A.2d 425-26 (discussing Evans's detention and search).

165. *See supra* notes 83-84 and accompanying text (noting that the court applied this definition of arrest in many cases over the span of twenty-seven years).

166. *Evans*, 352 Md. at 520 n.17, 723 A.2d at 435 n.17. The court stated that "it might be argued that a prerequisite to a constitutionally permissible search incident is the existence of an intent by the arresting officers to prosecute. If such be the case, the requirement was fulfilled in the present case[ ]." *Id.* The court reached this conclusion based on the testimony of Officer Dobbins, who stated that the purpose of delaying the formal arrests of drug offenders in Operation Mid-East was to keep the operation quiet in the communities which were being policed, so the officers could make arrests "in a mass sweep" at a later date. *Id.*

will benefit police officers by allowing them to do their jobs more effectively. Furthermore, it will benefit the courts by allowing them to use an objective standard of reviewing police practices, without infringing on the rights of citizens, who remain immune from searches that are not based on probable cause to arrest and that are not accompanied by a valid custodial or noncustodial arrest.

HAROLD B. WALTHER

VIII. EDUCATION LAW

A. *The Application of Public Records Laws*

Kirwan v. The Diamondback[1] involved the interpretation of two public information statutes: the Maryland Public Information Act (MPIA)[2] and the Family Educational Rights and Privacy Act (FERPA)[3]. In *Kirwan*, the Court of Appeals held that records concerning National Collegiate Athletic Association (NCAA) violations by members of a university basketball team were disclosable to the university's newspaper under MPIA[4] and FERPA.[5] These Acts provide for the disclosure of certain "public records" and provide confidentiality for others.[6] One aspect of the disclosure determination is the weighing of the private and public interests involved.[7] The *Kirwan* court, however, failed both to consider plausible alternative interpretations of MPIA and FERPA and to acknowledge that a "balancing of interests" is required under the acts. Also, the University of Maryland failed to make several strong arguments for its position under both MPIA and FERPA. Therefore, the *Kirwan* decision unnecessarily weakened the value of these laws in protecting confidential records. This Note will focus on the varied statutory interpretations of the Acts, the "balancing of interests" tests applied, and the *Kirwan* court's failure to acknowledge this broad history.

1. The Case.—The University of Maryland, College Park campus, began corresponding with the NCAA in February 1996 regarding a student-athlete's violations of NCAA rules.[8] The student-athlete, a member of the men's basketball team, had accepted money from a former coach to pay campus parking tickets.[9] As a result, the NCAA suspended the student for three games.[10]

This incident, as well as others involving the men's basketball team, became the subject of an investigation by *The Diamondback*, a

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1. 352 Md. 74, 721 A.2d 196 (1998).
2. MD. CODE ANN., STATE GOV'T §§ 10-611 to -628 (1997).
3. 20 U.S.C. § 1232(g) (1994).
4. *See Kirwan*, 352 Md. at 89, 721 A.2d at 203.
5. *Id.* at 94, 721 A.2d at 206.
6. *See infra* notes 34-59 and accompanying text (discussing the provisions of the MPIA and FERPA).
7. *See infra* notes 36-43 and accompanying text (describing the "balancing of interests" test applied by the courts in making a determination regarding disclosure of records).
8. *See Kirwan*, 352 Md. at 79, 721 A.2d at 198.
9. *See id.*
10. *See id.*

College Park campus newspaper.[11] The other incidents investigated involved allegations that some of the student-athletes on the basketball team were parking illegally on campus and were "receiving preferential treatment from the University with respect to the parking violation fines imposed."[12] The newspaper also investigated allegations that Coach Gary Williams was parking illegally on campus.[13]

As part of its investigation, the newspaper requested records several times from the University pursuant to the MPIA.[14] The newspaper requested copies of the correspondence between the University and the NCAA concerning the suspension of the student-athlete, as well as records concerning the parking violations of the team members and Coach Williams.[15]

The University refused to disclose these records.[16] It contended that the records concerning Coach Williams were "personnel records" under the MPIA and were therefore exempt from disclosure.[17] In addition, it argued that the parking tickets were "financial records," which are also exempt from disclosure under the MPIA.[18] Finally, the University claimed that any records concerning the student-athletes were "educational records" protected from disclosure by FERPA.[19]

The Diamondback brought an action in the Circuit Court for Prince George's County requesting disclosure of the records and attorney fees.[20] The case was decided on summary judgment, granting the paper's request for the records but denying the request for attorney fees.[21] The University appealed to the Court of Special Appeals, and the newspaper filed a cross-appeal.[22] The Court of Appeals issued a writ of certiorari before the Court of Special Appeals heard the case.[23]

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11. *See id.*

12. *Id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See id.* at 80, 721 A.2d at 198.

17. *See id.*; *see also* MD. CODE ANN., STATE GOV'T § 10-616(h) (1997) (stating the exemption for personnel records).

18. *Kirwan*, 352 Md. at 80, 721 A.2d at 199.

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.* (citing Kirwan v. Diamondback, 346 Md. 372, 697 A.2d 112 (1997)).

2. Legal Background.—The Freedom of Information Act (FOIA)[24] and the Family Educational Rights and Privacy Act (FERPA),[25] also known as the Buckley Amendment, are public information laws that govern the disclosure of public records.[26] The purpose of FERPA is to maintain the confidentiality of educational records, and therefore disclosure of educational records is generally limited to students and their parents with some exceptions.[27] The determination of what constitutes "educational records," however, has created controversy within the courts.[28] In contrast, under the federal FOIA, and state versions of the Act, disclosure of public records is presumed.[29] Secrecy of public records is discouraged under FOIA, unless there are legitimate public or private interests that outweigh disclosure.[30] Courts apply a "balancing of interests" test to determine whether these interests outweigh disclosure.[31] In addition, some courts advocate for the partial disclosure of records in certain instances.[32] The courts have also disagreed on whether NCAA records are subject to disclosure under FOIA, and whether a university's records concerning intercollegiate athletic conferences are "educational," and therefore disclosable in limited circumstances under FERPA.[33]

a. The Public Records Laws and Their "Balancing of Interests" Tests.—FOIA gives the public the right to access information held by

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24. 5 U.S.C. § 552 (1995).

25. 20 U.S.C. § 1232g (1994).

26. *See Kirwan*, 352 Md. at 80, 90, 721 A.2d at 198, 204.

27. *See* 20 U.S.C. § 1232g(b)(1) (1994); *see also infra* note 53 and accompanying text (describing the statute's restrictions on release of records to third parties without parental consent).

28. *See infra* Part 2.b (discussing how courts have interpreted "educational records" under FERPA).

29. *See infra* note 36 and accompanying text (noting that reviewing courts have consistently found a presumption in favor of disclosure of public records under FOIA and narrow exemptions from disclosure).

30. *See infra* notes 37-43 and accompanying text (describing the application of the "balancing of interests" test).

31. *See infra* notes 37-47 and accompanying text (discussing the balancing test, which involved balancing the public and state interests favoring disclosure or confidentiality against the private interests involved).

32. *See infra* notes 109-124 and accompanying text (discussing instances in which courts have discussed disclosing only the statistics from certain records to keep students' identifying information confidential).

33. *See infra* notes 129-149 and accompanying text (discussing whether the NCAA is a public or governmental body subject to public records laws such as FOIA and whether they fall within the definition of "educational" under FERPA).

federal agencies.[34] State versions of the Act afford access to information from state and local government agencies.[35] For both the federal and all state FOIA and public records laws, courts consistently find "both a presumption in favor of disclosure of public records and a narrow construction of exemptions from disclosure."[36] The majority of courts apply a "balancing of interests" test to determine whether disclosure of certain information is permissible.[37] This balancing test weighs the public and state interests involved.[38] Thus, a document may be withheld if either the state or public interests in confidentiality outweighs disclosure,[39] or the record may be provided if the public's interest favors disclosure. Some courts argue that the state may have a "legitimate interest" in keeping the records "confidential," or the public's interest might be "best served" by keeping them confidential.[40] Other court opinions suggest that "[t]he legitimate interest in nondisclosure may be based upon public policies of privacy, confidentiality, or the best interest of the state in carrying out its legitimate activities."[41] As an example, Exemption 6 under the federal FOIA "provides that FOIA disclosure requirements do not apply to 'personnel

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34. *See* Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW 65, 65 (1996) (stating that the FOIA was adopted in 1966 "for the express purpose of increasing disclosure of government records" (internal quotation marks omitted) (quoting Cox v. U.S. Dep't of Justice, 576 F.2d 1302, 1304 (8th Cir. 1978)).

35. *See id.* (noting that after the passage of the FOIA, "each of the fifty states not already having an open records statute adopted its own version of the FOIA").

36. *Id.* at 66. State public records laws "universally favor[ ] openness, and the burden is on the public body withholding the record to prove that the record falls into an exempted category." *Id.* at 79. The Maryland Public Information Act has been similarly construed. *See* A.S. Abell Publ'g Co. v. Mezzanote, 297 Md. 26, 32, 464 A.2d 1068, 1071 (1983)). The *Mezzanote* court noted:

> [T]he provisions of the Public Information Act reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government. Accordingly, [the provisions of the statute] must be liberally construed . . . in order to effectuate the Public Information Act's broad remedial purpose.

37. *See* Nowadzky, *supra* note 34, at 79; *see also, e.g.*, Child Protection Group v. Cline, 350 S.E.2d 541, 543 (W.Va. 1986) (considering the "value of the public interest" as a factor in determining whether public disclosure is appropriate).

38. *See* Nowadzky, *supra* note 34, at 79.

39. *See id.*

40. *Id.* (citing Black-Panther Party v. Kehoe, 117 Cal. Rptr. 106, 114 (Ct. App. 1974) (finding that the public's interest in providing "accused licensees with copies of consumer complaints" did not "outweigh the public's interest in encouraging complaints by provisional assurances of confidentiality")).

41. *Id.* (citing Carlson v. Pima County, 687 P.2d 1242, 1245 (Ariz. 1984) (noting that the limitations on open disclosure "are based on the conflict between the public's right to openness in government, and important public policy considerations relating to protection of either the confidentiality of information, privacy . . . or a concern about disclosure detrimental to the best interests of the state")).

and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'"[42] Disclosure is determined by balancing individual privacy rights against the public's interest to know.[43]

The MPIA has a similar "unwarranted invasion" of privacy provision.[44] The MPIA entitles the public to disclosure, "unless an unwarranted invasion of the privacy of a person in interest would result."[45] Maryland deals with confidential records differently than most other states, because the MPIA divides confidential information into "required denials" and "permissible denials."[46] It has been suggested that "[d]enials of inspection are required when the public record is privileged or confidential by definition, or when allowing inspection would be contrary to a state statute, a federal statute or regulation, rules of the court of appeals, or a court order."[47]

The Family Educational Rights and Privacy Act[48] is a federal statute which provides protections to personal privacy of students and their parents.[49] As in the analysis of records under FOIA, courts apply a balancing of interests test in determining what material is protected by FERPA.[50] Whereas FOIA has a presumption in favor of disclosure, this is not necessarily the case with FERPA.[51] FERPA was enacted to protect the privacy of students and their parents, and it conditions

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42. 37A AM. JUR. 2D *Freedom of Information Acts* § 249 (1994) (quoting 5 U.S.C. § 552(b)(6) (1994)).

43. *See id.*

44. MD. CODE ANN., STATE GOV'T § 10-612(b) (1997) [hereinafter MPIA].

45. *Id.*

46. Nowadzky, *supra* note 34, at 90. Sections 10-615 through 10-617 of the MPIA delineate those public records required to be nondisclosable, and section 10-618 deals with "permissible denials." *See* MPIA §§ 10-615 to 10-618. Section 10-616 deals with "personnel records," and section 10-617 discusses "financial information." MPIA §§ 10-616, 10-617. Section 10-618(a)-(g) includes those records for which it is permissible to deny disclosure, if inspection "would be contrary to the public interest." MPIA § 10-618. These records include "interagency or intra-agency letter[s] or memorand[a] that would not be available by law to a private party in litigation with the unit," "examination information," "details of a research project," "a real estate appraisal," "records of investigations" conducted by specified officials and certain other "investigatory file[s]." *Id.*

47. Nowadzky, *supra* note 34, at 90.

48. 20 U.S.C. § 1232(g) (1994); *see also* 34 C.F.R. §§ 99.1-99.67 (1996). FERPA is also referred to as the "Buckley Amendment" and is part of the General Education Provisions Act, 20 U.S.C. §§ 1221-1235 (1994).

49. *See* John E. Theuman, Annotation, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C.A. §1232g)*, 112 A.L.R. FED. 1, 15 (1993).

50. *See, e.g.*, Red & Black Publ'g Co. v. Board of Regents, 427 S.E.2d 257, 260-62 (Ga. 1993) (finding that documents involving violations of University regulations are not the type of documents that FERPA sought to protect from disclosure).

51. *See* 20 U.S.C. § 1232g(a)(1)(A).

receipt of federal funding by educational institutions on their compliance with procedures relating to the maintenance of educational records.[52] One scholar has summarized FERPA as follows: "These procedures are generally designed to insure that the parents of students may obtain access to the students' educational records and may challenge the contents of such records, and, on the other hand, to restrict the release of students' educational records to third parties without the parents' consent."[53]

Universities and other educational institutions have raised FERPA as a bar to disclosing information that would otherwise be disclosed under a state or federal FOIA.[54] "Records" are defined broadly in the statute[55] to include "those records, files, documents and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."[56] Employee records are not covered by FERPA,[57] nor are records created and maintained for law enforcement purposes by a law enforcement unit within a university.[58]

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52. *See* U.S.C. § 1232g(a)(1)(A). FERPA provides that

> [n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.

Furthermore, the statute provides that "whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student." 20 U.S.C. § 1232g(d).

53. Theuman, *supra* note 49, at 15 (citing 20 U.S.C. § 1232g(a)(1), § 1232g(a)(2), § 1232g(b)(2)).

54. *See id.* at 16. Thurman discusses that FERPA is intended to allow for parental access to student records, though intended to restrict access of those records to other third parties, who might otherwise have had access under FOIA.

55. *See* Lynn M. Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 624 (1997) (noting that "any recorded information that is created or maintained by a school, school employee, or a person 'acting for' a school, that is directly related to a particular student, is a record for Buckley Amendment purposes").

56. 20 U.S.C. § 1232g(a)(4)(A).

57. *See* Daggett, *supra* note 55, at 623.

58. *See id.* at 626-27. The law enforcement exception "was created for campus police records at colleges and universities." *Id.* at 627. Certain psychological evaluations of schoolchildren are "educational records." *See* Theuman, *supra* note 49, at 16. Teacher evaluations, however, have been held not subject to FERPA, nor an individual's lawsuit against a school district, nor records maintained by intercollegiate athletic associations, nor college testing programs. *See id.* Furthermore, the release of students' names, addresses, telephone numbers, and similar information "has been held not to violate FERPA where the institutions involved have designated such records as 'directory information.'" *Id.* at 17; *see also infra* notes 74-79 and accompanying text (discussing FERPA's provision for "directory information").

The issue of whether FERPA covers crime reports in its general category of "educational records," and what constitutes educational records, however, has invited much debate.[59]

b. Applying the FERPA and FOIA Balancing of Interests Tests.— In *Red & Black Publishing Co. v. Board of Regents*,[60] the Supreme Court of Georgia balanced interests under both FERPA and the state open records acts.[61] The court held that the University of Georgia student newspaper had a right of access to the records and the proceedings of the university's student Organization Court.[62] The Georgia court ruled that the records concerning the students were not "education records" within the meaning of FERPA.[63] The court argued that "the records are not of the type the Buckley Amendment is intended to protect, i.e., those relating to individual student academic performance, financial aid, or scholastic probation."[64]

In addition, the court held that the records and proceedings were "public" under the Georgia Open Records Act[65] and Open Meetings Act.[66] The purpose of Georgia's Open Records Act is to "encourage public access" to "public records," so that "the public can evaluate the expenditure of public funds and the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public."[67] In light of this presumption in favor of disclosing such public records and meetings, the court concluded that though "openness in sensitive proceedings is sometimes unpleasant,

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59. *See, e.g.*, Belanger v. Nashua, New Hampshire Sch. Dist., 856 F. Supp. 40, 48-50 (D.N.H. 1994) (interpreting "educational records" under FERPA to include juvenile court records maintained by the district attorney); Red & Black Publ'g Co. v. Board of Regents, 427 S.E.2d 257, 261-62 (Ga. 1993) (finding that records regarding violations of university regulations are not "educational records" under FERPA); *see also infra* notes 60-64 and 70-73 (describing the holdings of *Red & Black Publishing Co.* and *Belanger*).

60. 427 S.E.2d 257 (Ga. 1993).

61. *Id.* at 260-62.

62. *See id.* at 261-62.

63. *Id.* at 261.

64. *Id.*

65. *See id.* at 260.

66. *See id.* at 263. According to the court,

> [t]he Organization Court hears and adjudicates cases involving alleged University rule and regulation violations on the part of fraternities and sororities . . . . Hearings of the Organization Court are closed to the public at the request of the defendant organization. Specific University regulations pertaining to student organizations include prohibitions against: damage to property, disorderly conduct, alcohol and drug misuse, unauthorized entry, gambling, and hazing.

Id. at 260.

67. *Id.* at 260 (quoting Athens Observer, Inc. v. Anderson, 263 S.E.2d 128, 130 (Ga. 1980)).

difficult, and occasionally harmful, . . . the policy of this state is that the public's business must be open."[68] The court explained that this policy "protect[s] against potential abuse," and "maintain[s] the public's confidence in its officials."[69]

In contrast, in *Belanger v. Nashua, New Hampshire School District*[70] the United States District Court for the District of New Hampshire held that school district records relating to a student's juvenile court proceedings and maintained by a district attorney, were "education records," which a parent was entitled to access.[71] The court ruled that the records were "educational" because they directly affected the student's "education and residential placement."[72] The court supported a broad interpretation of FERPA, finding that the files maintained by the attorney for the District fell within FERPA's definition of "education records," because they were "records, files, documents, and other materials which . . . contain information directly related to a student" and are "maintained by an educational agency or institution or by a person acting for such agency or institution."[73]

Similarly, the court in *Kestenbaum v. Michigan State University*[74] held that FERPA did not bar disclosure to a private individual of a copy of a University computer tape, which contained the names, addresses, phone numbers, and other items of information of students enrolled at the University.[75] The Michigan Court of Appeals, however, held that the tape was exempt from release under the privacy provision of the State's FOIA.[76]

Under FERPA, "directory information" can be released if the educational institution gives public notice of the type of information to be published, informs students and parents of their right to forbid disclosure, and the time period within which a student or parent must act to forbid disclosure.[77] To release "personally identifiable information," the educational institution must obtain written consent from the parent or student over eighteen years of age.[78] The University complied

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68. *Id.* at 263.
69. *Id.* (citing *Athens Observer*, 263 S.E.2d at 130-31).
70. 856 F. Supp. 40 (D.N.H. 1994).
71. *Id.* at 50.
72. *Id.* The court concluded that "[h]is problems with the court system, along with his educational disabilities, had a direct bearing on his educational and residential placement." *Id.*
73. *Id.* at 48 (internal quotation marks omitted) (quoting 20 U.S.C. § 1232g(1)(4)(A)).
74. 294 N.W.2d 228 (Mich. Ct. App. 1980).
75. *Id.* at 233.
76. *Id.* at 236.
77. *Id.* at 232 (citing 45 C.F.R. § 99.37).
78. *Id.* at 231-32 (citing 45 C.F.R. § 99.31).

with the directory information requirement and therefore did not violate FERPA.[79]

Although FERPA would permit disclosure of the tape, the court refused disclosure under the state FOIA.[80] Under the Michigan FOIA, information is exempt from disclosure if it is of "a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."[81] The plaintiff wanted the directory information to compile a mailing list for its commercial enterprise of political campaign mailing.[82] The court ruled that the plaintiff's interest in compiling this information did not outweigh students' privacy interests, because the plaintiff had other means of disseminating political information without obtaining the directory information.[83] The court held that to allow disclosure would be an unwarranted invasion of privacy, because the public interest in releasing the information did not outweigh the harm to the people involved.[84] The court concluded that "[t]o override constitutional privacy interests, a countervailing state interest must exist and be compelling at the point where those interests collide."[85]

In *DTH Publishing Co. v. University of North Carolina at Chapel Hill*,[86] the Court of Appeals of North Carolina held that disclosure of information contained in recordings of closed court proceedings was not appropriate.[87] In *DTH*, a newspaper brought suit against a university and its undergraduate court alleging that closure of student disciplinary proceedings by the court violated FERPA and the Open Meetings Law.[88] The court ruled that the undergraduate court was a "public body" under the Open Meetings Law.[89] The court further held that

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79. *See id.* at 232-33.

80. *Id.* at 233, 236.

81. *Id.* at 233 (citing MICH. COMP. LAWS ANN. § 15.243).

82. *See id.*

83. *Id.* at 235.

84. *Id.*

85. *Id.* (internal quotation marks omitted) (quoting Byron, Harless, Schaffer, Reid & Assocs., Inc. v. Florida, 360 So. 2d 83, 97 (Fla. Dist. Ct. App. 1978)).

86. 496 S.E.2d 8 (N.C. Ct. App. 1998).

87. *Id.* at 16.

88. *Id.* at 10.

89. *Id.* at 11. "Public body" under the Open Meetings Law

> means any elected or appointed authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that . . . exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function.

Id. at 10 (quoting N.C. GEN. STAT. § 143-318.10 (1996)).

FERPA rendered the student information discussed in the undergraduate court "privileged and confidential" under the Open Meetings Law.[90] The court explained that FERPA withholds federal aid if an educational institution has a "policy or practice of releasing educational records, or personally identifiable information contained in educational records, to anyone other than certain enumerated persons and entities without the consent of the student's parents or the student, if the student is eighteen years or older."[91] Furthermore, the court concluded that FERPA "clearly expresses the federal policy that student education records should not be widely disseminated to the public and, except in certain enumerated circumstances, should not be released without proper consent."[92]

c. Applying the MPIA Balancing of Interests Tests.—Maryland cases employ a similar balancing of interests. In *Mayor and City Council of Baltimore v. Burke*,[93] the City of Baltimore (City) initiated litigation against a newspaper for permission to continue refusing to disclose requested documents relating to the design and construction of improvements to the Patapsco Waste Water Treatment Plant.[94] The Court of Special Appeals held that the disclosure of these documents did not result in substantial injury to the public interest, and therefore documents were released to the newspaper.[95] Section 10-619 of the MPIA permits temporary denial of inspection of public records "[w]henever . . . the official custodian believes that inspection would cause substantial injury to the public interest."[96] The City argued that disclosure would do "substantial injury to the public interest because it would result in the loss of a strategic advantage in the City's defense of [other] claims which are presently in arbitration."[97] The court held that disclosure was permitted because "the tactical disadvantage which the city may suffer in resolving the pending . . . claims because of the disclosure is insufficient to establish 'a substantial injury to the public interest' permitting the denial of inspection pursuant to section 10-619."[98]

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90. *Id.* at 12.

91. *Id.* (citing 20 U.S.C. § 1232g(b), (d) (1997)).

92. *Id.* (citing 20 U.S.C. § 1232g(b), (d)).

93. 67 Md. App. 147, 506 A.2d 683 (1986).

94. *Id.* at 149-50, 506 A.2d at 684-85.

95. *Id.* at 155, 506 A.2d at 687.

96. *Id.* at 152, 506 A.2d at 686 (quoting MD. CODE ANN., STATE GOV'T, § 10-619 (1985)).

97. *Id.* at 153, 506 A.2d at 686.

98. *Id.* at 155, 506 A.2d at 687.

The court also supported the newspaper's request for a fee waiver in obtaining those documents.[99] A fee waiver is granted under the MPIA if "[a]fter consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest."[100] The "other relevant factors" in this case included

> the health hazard created by the discharge of inadequately treated sewage into the Patapsco River, the importance of public exposure of the delayed and extremely costly improvements to the . . . Treatment Plant, and the danger that imposing a fee for information upon a newspaper publisher might have a chilling effect on free exercise of freedom of the press.[101]

In *Mayor and City Council of Baltimore v. Maryland Committee Against the Gun Ban*,[102] a political committee requested permission to inspect reports of investigation by the Internal Investigation Division of the City police department regarding the conduct of police officers during service of a subpoena *duces tecum* on the committee.[103] The Court of Appeals held that the committee was not a "person in interest" within the meaning of the MPIA, because it was not the subject of the investigation.[104] Furthermore, the court ruled that the denial of inspection was justified on the grounds of public interest.[105] Under MPIA § 10-618(f)(1), "a custodian may deny inspection of . . . records of investigations conducted by . . . a police department,"[106] and denial is permissible under § 10-618(a) "if a custodian believes that inspection of a part of a public record by the applicant would be contrary to the public interest."[107] The court concluded that the public has an interest in the confidentiality of investigations of police officers, and disclosure is allowed only if the purpose of disclosure is the defense of an officer.[108]

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99. *Id.* at 157, 506 A.2d at 688.

100. *Id.* at 156, 506 A.2d at 688 (quoting MPIA § 10-621(d)(2)).

101. *Id.* at 157, 506 A.2d at 688.

102. 329 Md. 78, 617 A.2d 1040 (1993).

103. *Id.* at 80, 617 A.2d at 1041.

104. *Id.* at 90, 617 A.2d at 1045.

105. *See id.* at 95, 617 A.2d at 1048 (noting that "fairness to the investigated officers and the avoidance of needless publicity to the cooperating witnesses, with possible inhibiting effects on future investigations, justify on public interest grounds the custodian's denial of inspection to one other than a person in interest").

106. MPIA § 10-618(f)(1).

107. MPIA § 10-618(a).

108. *See Maryland Comm.*, 329 Md. at 95, 617 A.2d at 1048.

d. Partial Disclosure of Records.—In *Miami Student v. Miami University*,[109] the student newspaper sought records of student disciplinary proceedings to develop a database and to track student crime trends on campus.[110] The University released the records, but deleted from the records the identity, sex, and age of the accused students, and the date, time, and location of the disciplinary incidents.[111] The newspaper filed suit, requesting that the records be fully disclosed, with only the redaction of the names and Social Security numbers (or identification numbers) of the accused students.[112] The Supreme Court of Ohio held that these records were not "education records" as defined by FERPA.[113] Furthermore, the majority ordered the disclosure of the general location of the incident, the age and sex of the student, the nature of the offense, and the type of penalty imposed.[114] The court stated that "[b]y deleting relevant data . . . respondents have denied students at Miami University as well as the general public the right to obtain invaluable information, including when and where alleged offenses took place and how guilty offenders were punished."[115] The court determined that the disclosure of these statistics is essential for student safety and thus outweighed the interests in confidentiality and privacy.[116]

The dissent disagreed with this holding.[117] The dissent argued that FERPA requires the deletion of "personally identifiable information," which includes the name of the student or student's family member and "information that would make the student's identity easily traceable."[118] The majority cited *Red & Black* for the authority that disciplinary records are not educational and therefore not subject to FERPA.[119] The dissent, however, argued that *Red & Black* was decided before the 1995 amendments to FERPA's regulations.[120] According to the dissent, these amendments provided that disciplinary records were always considered education records.[121] The dissent concluded that the "courts must give due deference to an administrative interpreta-

109. 680 N.E.2d 956 (Ohio 1997).
110. *Id.* at 957.
111. *See id.*
112. *See id.*
113. *Id.* at 959.
114. *Id.* at 959-60.
115. *Id.* at 959.
116. *Id.*
117. *Miami Student*, 680 N.E.2d at 960 (Lundberg, Stratton, JJ., dissenting).
118. *Id.* (internal quotation marks omitted) (quoting 34 C.F.R. 99.3 (1997)).
119. *Id.* at 959.
120. *Id.* at 961 (Lundberg, Stratton, JJ., dissenting).
121. *Id.*

tion formulated by an agency which has accumulated substantial expertise, and to which Congress has delegated the responsibility of implementing the congressional command."[122]

The *DTH* court distinguished its holding from *Miami Student*, explaining that the Ohio Supreme Court "ordered the release of essentially statistical information regarding disciplinary proceedings," and not identifiable information about a student which would jeopardize the student's privacy.[123] The *DTH* court explained that it did not follow *Miami Student* because "in this case . . . it is undisputed that the identity of the student would not be protected if the meeting was open."[124]

Also, the *DTH* court contended that there is no "tradition of access" for the public to the proceedings of the Undergraduate Court.[125] The court conceded that there is a "strong presumption" that civil proceedings be open to the public.[126] The *DTH* court explained, however, the university court's powers "are not derivative of our judiciary system nor are they limited by the necessary safeguards protecting a citizen in our court system."[127] Furthermore, the court determined that the Undergraduate Court's disciplinary proceedings have not been "historically open to the public as have traditional civil and criminal trials."[128]

e. NCAA Cases and the Public's Interest.—A part of the discussion regarding private and public interests is the issue of whether the NCAA is a public, or governmental body subject to public records laws.[129] Requests for information from colleges and universities con-

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122. *Id.* at 962.

123. DTH Publ'g Corp. v. University of North Carolina, 496 S.E.2d 8, 12 (N.C. Ct. App. 1998); *see supra* notes 86-92 (discussing the *DTH* court's finding that disclosure of university court proceedings was inappropriate).

124. 496 S.E.2d at 12-13. The *DTH* court maintained that it would be impossible to conduct a student disciplinary hearing without revealing confidential student records which are covered by FERPA. *Id.* at 13. The court stated further that "[g]iven the breadth of FERPA's definition of 'education records' and based on the stipulated facts, the student records at issue in this appeal are protected as 'education records' under FERPA and are 'privileged or confidential pursuant to the law . . . of the United States' under N.C.G.S. § 143-318.11(a)(1)." *Id.*

125. *See id.* at 15. The court determined that "there is no record evidence that UNC disciplinary proceedings . . . have been historically open to the public as have traditional civil and criminal trials." *Id.*

126. *Id.* at 13.

127. *Id.* at 15.

128. *Id.*

129. *See generally* Marc A. Eichler, Note, *Public Records—National Collegiate Athletic Association and Southwest Conference are not covered by State Freedom of Information Act*, 1 SETON HALL J.

cerning violations of NCAA rules and regulations have been the source of litigation recently under public open records laws and public information acts.[130] The source of many NCAA violations in recent years has been the cash payments or other non-cash forms of compensation to student athletes, sometimes by school personnel.[131] Activities that are less clearly "violations" have occurred as well, including the provision of fringe benefits, such as access to free off-campus housing, to student athletes by university personnel.[132] The media, and other members of the public, have used federal and state open records laws to force disclosure of intercollegiate athletic association information concerning these infractions, by claiming that these associations' investigations constitute "public records."[133]

In *NCAA v. Tarkanian*,[134] the Supreme Court held that a university's compliance with NCAA sanctions against the school's basketball coach did not transform the Association's conduct into state action.[135] The Court held, therefore, that the NCAA could not be held liable for civil rights violations under § 1983.[136] In the same year, the Fifth Circuit, in *Kneeland v. National Collegiate Association*,[137] ruled that the NCAA and the Southwest Athletic Conference were not governmental bodies subject to the Texas Open Records Act.[138] State courts, however, have reached different results under state versions of the FOIA regarding other intercollegiate athletic conferences. In *Arkansas Ga-*

SPORT L. 149, 149 (1991) (examining court decisions that have addressed the applicability of open records laws to the NCAA).

130. *See* Dr. Michael D. Akers et al., *Federal and State Open Records Laws: Their Effects on the Internal Auditors of Colleges and Universities*, 3 MARQ. SPORTS L.J. 161, 163 (1993) (stating that "[w]ith public pressure for more disclosure, the potential exists for legislatures and courts to encourage the public and the media to use the Federal and State Open Records Laws to gain further access to the audit reports of college and university athletic departments prepared by internal auditors"); *see also* Susan Oberlander, *Scandal-Plagued SMU Requires Players to Take Course on Issues in Sports*, CHRON. HIGHER EDUC., May 10, 1989, at A33 (discussing a course on issues in sports required of athletes in the wake of NCAA violations by athletes at Southern Methodist University).

131. *See* Akers et al., *supra* note 130, at 161-62.

132. *See id.* at 162.

133. *See id.* at 163; *see also* Arkansas Gazette Co. v. Southern State College, 620 S.W.2d 258 (Ark. 1981) (holding that the Arkansas Intercollegiate Athletic Conference's records were public because they are a "voluntary association of publicly supported educational institutions"); Macon Tel. Publ'g Co. v. Board of Regents of the Univ. Sys. of Ga., 350 S.E.2d 23, 24-25 (Ga. 1986) (finding that records of the University of Georgia Athletic Association was disclosable to a newspaper under the Georgia Open Records Act).

134. 488 U.S. 179 (1988).

135. *Id.* at 199.

136. *See id.* at 182.

137. 850 F.2d 224 (5th Cir. 1988).

138. *See id.* at 231.

zette Co. v. Southern State College,[139] the court found that the Arkansas Intercollegiate Athletic Conference was partially publicly funded, and therefore information concerning the amounts of money awarded by member universities to student athletes each year was disclosable under the state FOIA.[140] Also, the Georgia Supreme Court in *Macon Telegraph Publishing Co. v. Board of Regents of the University System of Georgia*[141] held that university athletic association reports containing information about the income and expenses of the school's athletic programs were public records.[142]

There are compelling arguments on both sides of the question of when the NCAA should be subject to state open records laws and therefore disclose its records. The NCAA is comprised of state funded universities and has almost exclusive control over "the administration of collegiate athletics."[143] Furthermore, it has been argued that publicly exposing NCAA violations would encourage compliance with NCAA rules and discourage similar violations.[144] For these reasons, it should be treated as a public body. The NCAA, however, has a "gag rule" that prohibits NCAA enforcement staff from releasing information about violations before the matter in question is resolved.[145] The NCAA contends that this "gag rule" allows it to protect the academic integrity of its university members against suits brought by groups requesting information about current investigations.[146] According to the NCAA, the premature disclosure of information "would destroy the confidential nature critical to the enforcement process."[147] Also, the NCAA relies on witness testimony and cooperation in its investigations, but lacks subpoena and contempt powers, and therefore relies on the confidentiality of witness testimony to carry effectively through its enforcement duties.[148] Some argue, therefore, that witness participation might be damaged if the NCAA could not guarantee confidentiality for its witnesses.[149] Therefore, the NCAA believes records should not be released if the interest in privacy outweighs the public benefit of disclosure.

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139. 620 S.W.2d 258 (Ark. 1981).
140. *Id.* at 259.
141. 350 S.E.2d 23 (Ga. 1986).
142. *Id.* at 24-25.
143. Eichler, *supra* note 129, at 158.
144. *See id.*
145. *See id.* at 159-60.
146. *See id.* at 159.
147. *Id.*
148. *See id.* at 160 (citing THE STAR LEDGER, Jan. 26, 1989, at 68, col. 1).
149. *See id.*

3. The Court's Reasoning.—In *Kirwan*, the Court of Appeals considered whether the MPIA or the FERPA permitted disclosure of the information requested by *The Diamondback*, and whether the trial judge erred in refusing to award attorney fees to the newspaper.[150] First, the court discussed the "general presumption in favor of disclosure of government or public documents" under the MPIA.[151] According to the court, MPIA provides for the public's broad right to government information and contains a broad definition of "public record."[152]

Second, the court addressed the University's argument that the documents relating to Coach Williams's parking tickets were "personnel records" under the MPIA.[153] Under the MPIA, "personnel records" are exempt from disclosure and include applications for employment, performance ratings, and scholastic achievement information.[154] The court determined that although this list was not intended by the Legislature to be exhaustive, this list "reflect[s] a legislative intent that 'personnel records' mean those documents that directly pertain to employment and an employee's ability to perform a job."[155] The court found that the parking tickets did not reflect on Coach Williams's status as an employee or on his ability to perform his job, and therefore did not fall within the "personnel records" exemption.[156]

Furthermore, the court rejected the University's argument that if parking tickets are issued by campus police and handled by University departments, they "somehow become personnel records."[157] The

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150. *Kirwan*, 352 Md. at 79, 721 A.2d at 198.

151. *Id.* at 80, 721 A.2d at 199.

152. *Id.* at 80-81, 721 A.2d at 199 (citing MD. CODE ANN., STATE GOV'T § 10-612(b)). Section 10-612(a)-(b) provides:

> (a) General right to information.—All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees. (b) General construction.—To carry out the right set forth in subsection (a) of this section, unless an unwarranted invasion of the privacy of a person in interest would result, this Part III of this subtitle shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.

MPIA § 10-612(a)-(b).

153. *Kirwan*, 352 Md. at 82, 721 A.2d at 199-200.

154. *See id.* at 82, 721 A.2d at 200 (citing MPIA § 10-616(i)). Section 10-616(i) of MPIA provides that "a custodian shall deny inspection of a personnel record of an individual, including an application, performance rating, or scholastic achievement information." MPIA § 10-616(i).

155. *Kirwan*, 352 Md. at 82-83, 721 A.2d at 200.

156. *Id.* at 83-84, 721 A.2d at 200-01.

157. *Id.* at 83, 721 A.2d at 200.

court noted that "a parking ticket received by anyone else at his or her place of employment would ordinarily not be considered a personnel record. A parking ticket is simply a document charging a very minor misdemeanor."[158] According to the court, parking tickets did not fit within the common-sense meaning of "personnel records."[159]

Next, the court rejected the University's argument that the records concerning the students' and Coach Williams's parking tickets were "financial" information as defined in the MPIA, and therefore exempt from disclosure under the statute.[160] The University argued that failing to pay a parking ticket was a "financial matter" concerning the University.[161] The court, however, found that parking tickets did not fall within the legislative intent of the exemption.[162] According to the court, parking tickets are not "assets, income, liabilities, net worth, bank balances, financial history or activities, or creditworthiness," which are the exempted categories within the financial information section.[163] Parking tickets are not "record[s] of indebtedness," noted the court; rather, they are "citation[s] charging a misdemeanor," according to the Maryland Code.[164] The court determined that parking tickets are governed by the Maryland Code, even if they result from a university's on-campus parking violation.[165] Furthermore, throughout the Transportation Article of the Maryland Code, parking violation sanctions are referred to as fines, not debts.[166]

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158. *Id.*

159. *Id.*

160. *Id.* at 87, 721 A.2d at 202. Section 10-617 of the MPIA states in pertinent part: "Unless otherwise provided by law . . . , a custodian shall deny inspection of the part of a public record that contains information about the finances of an individual, including assets, income, liabilities, net worth, bank balances, financial history or activities, or credit worthiness." MPIA § 10-617(f)(2).

161. *See Kirwan*, 352 Md. at 85, 721 A.2d at 201.

162. *Id.*

163. *Id.* (quoting MPIA § 10-617).

164. *Id.* at 85, 721 A.2d at 201 (citing MD. CODE ANN., STATE GOV'T §§ 26-201 to -204 (1997)).

165. *Id.* at 86, 721 A.2d at 201-02. According to the court, "[t]he recipient of the parking ticket can either pay the fine to the University or elect to stand trial in the District Court of Maryland." *Id.*, 721 A.2d at 201. Furthermore, the court noted that "[t]he basic nature of the parking citation is not changed because the University normally does not report students or employees for violations of the parking regulations or failure to pay fines for violations of parking regulations; the University has the right to do so. Similarly, the nature of the parking ticket is not changed because the University collects the fine itself as it is authorized to do by § 26-203." *Id.*, 721 A.2d at 202.

166. *See id.* (citing MD. CODE ANN., TRANSP. §§ 26-305(a)(1)(i), 26-305(a)(3)(i), 26-305(c)(2), 26-305(e) (YEAR)); *see also* Brown v. Brown, 287 Md. 273, 279-80, 412 A.2d 396, 400 (1980) (acknowledging an earlier court's ruling that "the term debt does not include fines or penalties levied against one who has been adjudged in violation of the public law"); Ruggles v. State, 120 Md. 553, 564, 87 A.2d 1080, 1084 (1913) (ruling that the mone-

In addition, the University contended that disclosure of the documents would be against the public interest and therefore in violation of the MPIA.[167] The University argued that the Act allows "permissible denials" if the disclosure would be against the public's interest.[168] According to the University, the disclosure of the records was contrary to the public interest because it would have a "chilling effect" on the reporting of violations by the University to the NCAA, and it would discourage students from reporting violations.[169] The court rejected this public interest argument, stating that these records did not fall within any of the "permissible denials" categories in the MPIA.[170]

The University further asserted that disclosure would be "an unwarranted invasion of privacy," because it would be humiliating for the student-athletes and their families.[171] The court responded that if an adult commits a criminal offense, "it is doubtful that any 'invasion of privacy' occasioned by an accurate newspaper report of the matter is 'unwarranted.'"[172] Furthermore, the court contended that the unwarranted invasion of privacy exemption applies only if the records are covered under the Act.[173] The court already determined that these records were not "personnel" or "financial," and therefore were not covered by the Act.[174]

The court next discussed the University's arguments under FERPA.[175] FERPA provides that federal funds will be withheld from any university that has a "policy or practice of permitting the release of education records."[176] Education records are defined under the Act as "those records . . . which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."[177] The court reviewed the legislative history of this broad definition of education records and determined that it showed "an intent to stop the widespread dissemination of education records" to those other

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tary penalty authorized by statute for "operating a motor vehicle without a license" is a fine and not a debt).

167. *See Kirwan*, 352 Md. 87-88, 721 A.2d at 202 (citing MPIA § 10-618).

168. *See id.* at 88, 721 A.2d at 202-03; *see also supra* notes 46-47 (discussing "required" versus "permissible" denials under the MPIA).

169. *See Kirwan*, 352 Md. at 88, 721 A.2d at 202.

170. *Id.* at 88, 721 A.2d at 203.

171. *Id.* (citing MPIA § 10-612).

172. *Id.* at 88-89, 721 A.2d at 203.

173. *Id.* at 89, 721 A.2d at 203.

174. *Id.*

175. *Id.*

176. *Id.* at 89-90, 721 A.2d at 203-04 (quoting FERPA, 20 U.S.C. § 1232g(b)(1)).

177. 20 U.S.C. § 1232(a)(4)(A).

than students and their parents.[178] According to the court, Congress was also concerned "with the systematic violation of students' privacy."[179] The court concluded that the statute was not intended to preclude release of any document containing the name of a student; rather, it was intended to keep confidential "those aspects of a student's educational life that relate to academic matters or status as a student."[180]

The court cited several cases that ruled that records similar to those in *Kirwan* were not "educational records."[181] In *Red & Black Publishing v. Board of Regents*,[182] the Supreme Court of Georgia held that records from a student court which imposed disciplinary penalties on sororities and fraternities were not educational under FERPA.[183] The Georgia court argued that the records did not relate to individual academic performance, financial aid, or scholastic probation.[184] Following *Red & Black*, the court in *Kirwan* concluded that the requested records were not "educational" because they did not fit these criteria.[185] The *Kirwan* court also discussed the Supreme Court of Ohio's opinion in *The Miami Student v. Miami University*,[186] which held that records of a university disciplinary board are not education records as defined in FERPA.[187] According to the court in *Miami Student* as cited by *Kirwan*, the records "are nonacademic in nature" and "do not contain educationally related information, such as grades or other academic data, and are unrelated to academic performance, financial aid, or scholastic performance."[188]

The court also cited *Bauer v. Kincaid*,[189] a United States District Court for the Western District of Missouri case, which held that campus criminal investigations and incident reports maintained by a university department were not education records.[190] In *Kirwan*, both the University and the court relied on *Belanger v. Nashua*,[191] a New

178. *Kirwan*, 352 Md. at 90, 721 A.2d at 204.
179. *Id.* (citing Zaal v. State, 326 Md. 54, 72, 602 A.2d 1247, 1256 (1992) (finding that the FERPA exemption for disclosure in compliance with a judicial order "does not mean that a student's privacy or confidentiality interest is automatically overridden").
180. *Id.* at 91, 721 A.2d at 204.
181. *Id.* at 91-94, 721 A.2d at 204-06.
182. 427 S.E.2d 257 (Ga. 1993).
183. *Id.* at 261.
184. *Id.*
185. *Kirwan*, 352 Md. at 94, 721 A.2d at 206.
186. 680 N.E.2d 956 (Ohio 1997).
187. *Kirwan*, 352 Md. at 92, 721 A.2d at 205 (citing *Miami Student*, 680 N.E.2d at 959).
188. *Id.* (quoting *Miami Student*, 680 N.E.2d at 959).
189. 759 F. Supp. 575 (W.D. Mo. 1991).
190. *Id.* at 591.
191. 856 F. Supp. 40 (D.N.H. 1994).

Hampshire case which discussed *Bauer*.[192] The *Belanger* court held that records requested by the parent of a sixteen-year-old educationally disabled student, concerning a juvenile court order that placed this student in a residential education facility, were educational under FERPA.[193] The *Kirwan* court noted that the *Belanger* court distinguished *Bauer* by arguing that the records in *Bauer* "were not the 'type of information created in the natural course of an individual's status as a student,'" and were therefore excluded from FERPA.[194] Also, the *Belanger* court argued that the plaintiff in *Bauer* was not a party who was permitted access to education records under FERPA (plaintiff was not the student or the student's parent), whereas, in *Belanger*, the person seeking access was the student's parent.[195] The *Kirwan* court agreed that the records in *Belanger* were "clearly education records, directly concerned with which school and education plan would be best for the student."[196]

The court claimed, however, that the facts of the present case were more similar to cases such as *Miami Student* and *Red & Black*.[197] Therefore, the court held that records of parking tickets or correspondence between the NCAA and the University accepting a loan to pay for the tickets were not educational records under FERPA.[198]

The court also held that the trial court was correct in declining to award counsel fees to *The Diamondback*.[199] According to MPIA § 10-623(f), counsel fees may be awarded "[i]f the court determines that the complainant has substantially prevailed."[200] Because *The Diamondback* "substantially prevailed," the court needed only to determine whether the trial court abused its discretion in failing to award attorney's fees.[201] Upon balancing the public benefit of the disclosure against the University's interest in withholding the information, the court ruled that the trial court did not abuse its discretion in deciding not to award counsel fees, because the University's refusal to disclose

192. *Kirwan*, 352 Md. at 93, 721 A.2d at 205.

193. *Id.* (citing *Belanger*, 856 F. Supp. at 50).

194. *Id.* at 93-94, 721 A.2d at 205 (quoting *Belanger*, 856 F. Supp. at 50 (quoting *Bauer*, 759 F. Supp. at 590)).

195. *See id.* at 94, 721 A.2d at 205 (citing *Belanger*, 856 F. Supp. at 50).

196. *Id.*

197. *Id.* at 93-94, 721 A.2d at 205-06.

198. *Id.* at 94, 721 A.2d at 206.

199. *See id.* at 97, 721 A.2d at 207.

200. MPIA § 10-623(f).

201. *Kirwan*, 352 Md. at 96, 721 A.2d at 206.

the information was not entirely unwarranted in light of the broad definition of "education records" in FERPA.[202]

4. Analysis.—

a. What is Missing in Kirwan: *Alternative Arguments under FERPA and MPIA.*—In *Kirwan,* both the University and the Court of Appeals failed to consider several key arguments. First, the University did not advance the proper arguments to show that the definition of "educational" in FERPA covered the correspondence or that the correspondence was a personnel record under the MPIA. The records should have been found "educational" because of FERPA's broad definition of "educational," case law that considers disciplinary records similar to this correspondence to be "educational," and the nature of a student-athlete's educational environment.[203] Both the University and the court failed to acknowledge the possible breadth of FERPA and the numerous arguments to be made in favor of finding that the records were educational records. The court acknowledged briefly, as an aside at the end of the case, that FERPA could be read broadly to encompass these records as educational, but failed to acknowledge relevant case law and arguments for this.[204] Furthermore, the correspondence between the University and the NCAA, as opposed to the tickets received by the coach, could be classified as "personnel" records, because the correspondence directly related to the coach's status as a school employee.[205]

Second, the Court of Appeals did not properly balance the interests at stake in analyzing a request under MPIA, as it failed to consider certain policy concerns. These oversights by both the University and the court resulted in a failure to acknowledge the point of the balancing tests of both FERPA and MPIA. According to relevant case law and interpretations of the statutes, there are strong arguments to be made that disclosure of the correspondence was against both public and private interests.

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202. *Id.* at 96-97, 721 A.2d at 207. Furthermore, the court noted that there was no precedent in Maryland case law, nor much case law elsewhere, concerning the specific issues in *Kirwan. Id.*

203. *See infra* notes 206-221 and accompanying text (discussing reasons why FERPA should cover the records involved in *Kirwan*).

204. *Kirwan,* 352 Md. at 96-97, 721 A.2d at 207.

205. *See infra* notes 222-225 and accompanying text (discussing that the correspondence concerning the violations could be considered "personnel records" because they relate to Coach Williams' status and actions as a school employee).

b. Correspondence Records are "Educational" under the FERPA.— The language of the FERPA requires a finding that the records in *Kirwan* are educational records. FERPA defines "educational records" as those which "contain information directly related to a student" and which are "maintained by an educational agency or institution."[206] In *Kirwan*, the correspondence concerned, and therefore was "directly related to," the suspension of a student-athlete and was maintained by an "educational agency," the University.[207] Towards the end of the court's decision, the court acknowledged that FERPA could be read broadly in this manner;[208] however, it does not elaborate on this interpretation. The *Kirwan* court did rely on one court's opinion that held that a narrow interpretation of the statutory language was inappropriate, and therefore, it was not necessary for a court to look beyond the plain meaning of the statute to find that records were educational.[209]

Kirwan is distinguishable from other cases that have held that records similar to this correspondence are not educational. In *Miami Student v. Miami University*,[210] the Supreme Court of Ohio held that records of the University Disciplinary Board, dealing with infractions by students, were not "education records" as defined by FERPA.[211] The *Miami Student* dissent, however, argued that the disciplinary records were education records[212] and cited caselaw illustrating the broad nature of FERPA.[213] Also, the *Kirwan* court failed to mention that the *Miami Student* court did not require the full disclosure of the records, but rather only required disclosure of general information about the incident and the student perpetrator.[214]

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206. 20 U.S.C. § 1232g(a)(4)(A) (1994).

207. *See Kirwan*, 352 Md. at 79, 721 A.2d at 198. *The Diamondback* requested "copies of all correspondence between the University and the NCAA involving the student-athlete who was suspended and any other related correspondence during February 1996." *Id.*

208. *Id.* at 96, 721 A.2d at 207.

209. *Id.* at 93, 721 A.2d at 205 (citing Belanger v. Nashua, New Hampshire Sch. Dist, 856 F. Supp. 40, 50 (D.N.H. 1994)). The *Belanger* court stated that "[t]he plain meaning of the statutory language [of FERPA] reveals that Congress intended for the definition to be broad in its scope." *Belanger*, 856 F. Supp. at 48.

210. 680 N.E.2d 956 (Ohio 1997).

211. *Id.* at 959.

212. *Id.* at 960 (Lundberg, Stratton, JJ., dissenting). In 1995, Congress passed an amendment to regulations implementing FERPA, which laid out a clear definition of "law enforcement records." *See id.* at 961 (citing 34 C.F.R. § 99.8). The dissent noted that in the amendment the "Secretary of Education clarified that disciplinary records were always included as education records under FERPA."

213. *Id.* at 961.

214. *Id.* at 959. The court ordered that

> Miami University may delete from the UDB records the student's name, Social Security Number, and student identification number. The exact date and time of the alleged incident may also be deleted, since this constitutes other information

The *Kirwan* court found that the *Belanger* case was distinguishable from *Kirwan*.[215] In doing so, the court again failed to allow for the possibility of a broader interpretation of FERPA. The *Belanger* court argued that educational records should be the "type of information created in the natural course of an individual's status as a student."[216] The *Kirwan* court argued that "[t]he records involved in the *Belanger* case were clearly education records, directly concerned with which school and education plan would be best for the student."[217] The *Kirwan* court failed, however, to take this argument one step further to cover all student records that become part of the student's educational experience.

The University could have made the argument to disclose only a certain amount of information, as in the court's decision in *Miami Student*.[218] In addition, the *Kirwan* court could have relied on *DTH Publishing*, a case in which the court held that to allow an open disciplinary proceeding would jeopardize the privacy of individual students and therefore the University's Undergraduate Court was allowed to hold disciplinary proceedings in closed session.[219] The court, borrowing the parties' stipulations that it "is impossible to hold a student disciplinary hearing without divulging student records as defined under FERPA or personally identifiable information contained therein," held that the records were confidential educational records under FERPA.[220] In *Kirwan*, the newspaper requested the University to release information about an individual student that was identifi-

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that may lead to the identity of the student. The university must disclose, however, the general location of the incident, the age and sex of the student (which does not identify the student), the nature of the offense, and the type of disciplinary penalty imposed.

Id. at 959-60.

215. *Kirwan*, 352 Md. at 94, 721 A.2d at 205-06.

216. Belanger v. Nashua, New Hampshire Sch. Dist., 856 F. Supp. 40, 50 (D.N.H. 1994) (quoting Bauer v. Kincaid, 759 F. Supp. 575, 590 (W.D. Mo. 1991)); *see supra* notes 190-196 (examining the *Kirwan* court's discussion of *Belanger*).

217. *Kirwan*, 352 Md. at 94, 721 A.2d at 205. The *Belanger* court had properly concluded that "the records maintained by the District, from whatever source they may have been obtained, have a direct bearing on his placement and educational plan." *Belanger*, 856 F. Supp. at 50.

218. *See Miami Student*, 680 N.E.2d at 959; *see supra* note 214 (describing the court's decision to allow for partial disclosure).

219. DTH Publ'g v. University of N.C., 496 S.E.2d 8, 16 (N.C. Ct. App. 1998)

220. *Id.* at 13. FERPA provides that an educational institution will be denied funding if the education records or any personally identifiable information contained in the record other than directory information is disclosed to any third parties without the written consent of the student's parents, 20 U.S.C. § 1232g(b)(1), or the written consent of the student where the student attends a postsecondary education institution, 20 U.S.C. § 1232g(d). *See* Connoisseur Communication of Flint v. University of Mich., 584 N.W.2d

able to that student.[221] The University could have argued, in the alternative, for the release of only non-identifiable information about the student. Of course, there is still the concern that a prominent basketball player may be easily identifiable even if the minimum amount of information is released about him.

c. Correspondence "Personnel" Records Under MPIA.—The University argued that records of parking tickets received by Coach Williams were personnel records and therefore nondisclosable under the MPIA.[222] The University, however, failed to make the argument that the correspondence between the NCAA and the University involving the suspension was directly related to the personnel file of the coach. The Court of Appeals easily could have found that the correspondence fell within the part of MPIA limiting public access to personnel records.

According to the court in *Kirwan*, the legislative intent for the meaning of "personnel records" includes those records that "directly pertain to employment and an employee's ability to perform a job."[223] Furthermore, "the common meaning of a personnel record is 'a record that identifies an employee, is kept by the employer, and related to matters like hiring, firing, promotion, discipline, or dismissal of the employee.'"[224] Under this definition, it could be argued that the correspondence concerning the payment of these tickets and the resulting violations of NCAA rules are directly related to Coach Williams's status as an employee, because the violations and resulting suspension concern his conduct in his role as a school employee.[225]

d. Disclosure and the Public Interest.—The court's "balancing of interests" involved an examination of whether or not the disclosure of the records was an "unwarranted invasion of privacy," as defined

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647, 649 (Mich. Ct. App. 1998) (finding that a "Student-Athlete Automobile Information Sheet" was an education record precluded from disclosure without consent under FERPA).

221. *Kirwan*, 352 Md. at 79, 721 A.2d at 198.

222. *See id.* at 82, 721 A.2d at 199-200.

223. *Id.* at 83, 721 A.2d at 200.

224. *Id.* at 84, 721 A.2d at 201 (citing 78 Att'y Gen. Op. 297 (1993), which cites Michigan Prof'l Employees Soc'y v. DNR, 482 N.W.2d 460, 467 (Mich. App. 1992)); *see also* Providence Journal v. Kane, 577 A.2d 661, 663 (R.I. 1990) (stating that personnel records include "employment history, qualifications, job classifications, status within the civil service system, . . . work schedule, . . . and overtime history").

225. The basis for the NCAA investigations in *Kirwan* was the acceptance by a student-athlete of money from a former coach to pay the student's parking tickets, Coach Williams's parking violations, and the preferential treatment shown to the basketball team in terms of parking fines imposed. *See Kirwan*, 352 Md. at 79, 721 A.2d at 198.

under the MPIA.[226] An analysis under the MPIA, however, generally invites a balancing of other interests also.[227] The court should have considered other factors to determine whether the invasion of privacy was "unwarranted." The confidentiality of these records is not "unwarranted" when one balances the effect on the students and their educational experience, the effect on the NCAA investigation, the level of public safety at risk, and the tradition of access to such records. Furthermore, the records should not have been released under FERPA because they were not released to the entitled persons under that Act.[228]

In *Kirwan*, the court argued that the unwarranted invasion of privacy was not even a consideration because the records did not fall under the "personnel" or "financial" categories within MPIA, which are "required denials" for disclosure under MPIA.[229] Even if the records did not fall under "required denials," however, there are numerous reasons that disclosure is "unwarranted."

The court contended that this invasion of privacy is not "unwarranted" because it is appropriate to disclose publicly records of an adult's violations, and that the "extreme embarrassment" of the students is outweighed by the need to disclose the violations.[230] The court, however, did not consider the detrimental effect such publicity would have on the students' educational experience. It is possible that such publicity would affect the academic achievement, social interaction, and athletic experience of the students involved.

Furthermore, the court failed to consider the effect its holding would have on the NCAA investigation. In *Maryland Committee Against the Gun Ban*,[231] the Court of Appeals ruled that the release of records would damage the confidentiality of investigations of police officers.[232] Similarly, disclosing the information about the NCAA inves-

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226. *Kirwan*, 352 Md. at 88, 721 A.2d at 203.

227. *See, e.g.*, Child Protection Group v. Cline, 350 S.E.2d 541, 543 (W. Va. 1986) (applying a five-factor test to the issue of disclosure of information, including the level of invasion of privacy, the extent of the public interest, the expectation of confidentiality, the availability of the information from other sources, and the ability to craft relief to limit the privacy invasion).

228. *See* 20 U.S.C. § 1232g(b)(1) (describing those to whom disclosure would be permitted without consent).

229. *Kirwan*, 352 Md. at 89, 721 A.2d at 203; *see supra* notes 46-47 and accompanying text (discussing "required" and "permissible" denials under the MPIA).

230. *Kirwan*, 352 Md. at 88, 721 A.2d at 203.

231. 329 Md. 78, 617 A.2d 1040 (1993).

232. *Id.* at 97, 617 A.2d at 1049.

tigation before it is completed could impact negatively the enforcement and investigation process.[233]

In addition, in balancing the public's interest in safety against the necessity for disclosure, the court should have looked at the risk to public safety involved. In *Miami Student*, the information released concerned crime statistics on campus.[234] These records differed from those in *Kirwan* because of the nature of the offenses; the *Miami Student* records included criminal offenses such as physical and sexual assaults, "which may or may not be turned over to local law enforcement agencies."[235] Public safety was clearly at issue in *Miami Student*, thus requiring disclosure, whereas NCAA violations, though serious, do not endanger the public safety in this way. Similarly, in *Burke*, the disclosure and the fee waiver were permitted partly because of the public health hazards involved.[236] In *Kirwan*, no such compelling public interest in safety was implicated. It appears that the *Kirwan* court ignored precedent by failing to weigh these other interests.

Another consideration the court failed to acknowledge was the "tradition of access" to the requested records. Some cases, such as the Fifth Circuit's decision in *Kneeland*, have held that the NCAA is not a governmental body and, therefore, its records are not open to the public.[237] Other courts, however, have found intercollegiate athletic conferences to be partially publicly funded and, therefore, subject to open records laws.[238] Furthermore, access to a university's records has been denied by some courts, partly on the basis that there is no

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233. *See supra* notes 143-149 (discussing the detrimental effect that releasing NCAA records could have on the investigatory and enforcement process of the NCAA).

234. Miami Student v. Miami Univ., 680 N.E.2d 956, 957 (Ohio 1997); *see also supra* notes 110-116 and accompanying text (describing the Supreme Court of Ohio's opinion in *Miami Student*).

235. *Miami Student*, 680 N.E. 2d at 959. As explained by the court, "the University Disciplinary Board adjudicates cases involving infractions of student rules and regulations, such as underage drinking, but may also hear criminal matters, including physical and sexual assault offenses, which may or may not be turned over to local law enforcement agencies." *Id.*

236. Mayor of Baltimore v. Burke, 67 Md. App. 147, 157, 506 A.2d 683, 688 (1986) (finding that the health hazards associated with a sewage treatment plant weighed in favor of disclosure).

237. *See* Kneeland v. National Collegiate Athletic Ass'n, 850 F.2d 224, 231 (5th Cir. 1988); *see also supra* notes 137-138 and accompanying text (discussing the *Kneeland* court's holding).

238. *See, e.g.*, Macon Tel. Publ'g Co. v. Board of Regents of the Univ. Sys. of Ga., 350 S.E.2d 23, 24-25 (Ga. 1986) (finding that documents belonging to the University of Georgia Athletic Association constituted public records disclosable under the Open Records Act).

"tradition of access" to such records.[239] A university disciplinary body and the NCAA are not judicial bodies that are comparable to the court system.[240] Thus, they do not have the same "tradition of access" as do civil courts, and the necessary safeguards, such as due process, may not be available.[241]

The court also incorrectly interpreted FERPA. The court not only failed to find that the records are educational, but it also failed to mention that the records could not be released to the newspaper even if FERPA applied. The newspaper is not a party to whom records under FERPA can be released without consent: a student or the student's parent.[242] Thus, the newspaper is a third-party with no right of access to education records. The *Belanger* court discusses this by explaining that "[t]he intent of FERPA is to protect not only the privacy of students, but to ensure that parents have access to their children's education records that are used to make crucial decisions about their children's future."[243]

The *Kirwan* court argued that the release of these documents was not an "unwarranted invasion of privacy" as set forth in MPIA.[244] As argued above, however, the release of actual names and identifiable information is "unwarranted,"[245] for it is not necessary for the newspaper to have access to the full records, but rather, only to have access to certain information. The court in *Kirwan* could redact all but the most basic information concerning the student-athletes. This would preserve the anonymity of the students, thereby avoiding the "invasion of privacy" concerns. The public's interest in these records extends only so far; it is not necessary for the public to know the specific names of the students or even the specifics of the situation. The goal of deterring future NCAA violations would not be affected by releasing only minimal information, because the public would still know that the suspension and the investigation occurred. Basketball players at a large university are very identifiable, and therefore it might be

239. DTH Publ'g Corp. v. University of North Carolina, 496 S.E.2d 8, 15 (N.C. Ct. App. 1998) (contrasting the university court, to which there is no tradition of access, with civil and criminal trials which have historically been open to the public).

240. *See supra* notes 125-128 and accompanying text (describing the tradition of access afforded to civil and criminal proceedings).

241. *See DTH*, 496 S.E.2d at 15.

242. *See* 20 U.S.C. § 1232g(a)(1)(A) (1994). Section 1232g(b)(1) sets forth those entities to whom information may be disclosed without consent, and a school newspaper is not included among them. *See* 20 U.S.C. § 1232g(b)(1)(A)-(J).

243. Belanger v. Nashua, New Hampshire Sch. Dist., 856 F. Supp. 40, 52 (D.N.H. 1994).

244. *Kirwan*, 352 Md. at 89, 721 A.2d at 203.

245. *Id.*

difficult to release the minimum amount of information that will not identify the individuals.

5. Conclusion.—The Court of Appeals in *Kirwan* failed to recognize certain case law and statutory interpretations regarding FERPA and state and federal FOIA statutes. Similarly, the University of Maryland failed to make stronger arguments under both FERPA and MPIA. As a result, the records requested by *The Diamondback* are mischaracterized, and important arguments concerning public and private interests are not acknowledged in the *Kirwan* opinion. The court's opinion, while following some federal and state precedent, does not explore these alternative arguments under MPIA and FERPA.

TONI A. ROTH

IX. EVIDENCE

A. *An Arbitrary Denial of Defendants' Right to Compulsory Process and Due Process of Law Through the Per Se Exclusion of the Hypnotically Enhanced Testimony of Defense Witnesses*

In *Burral v. State*,[1] the Court of Appeals considered whether the per se exclusion of hypnotically enhanced testimony by a defense witness in a state criminal trial infringed on the defendant's constitutional rights under the Sixth and Fourteenth Amendments.[2] The court answered in the negative, holding that the defendant's Sixth Amendment right to compulsory process did not entitle him to present the testimony of a witness whose memory was hypnotically enhanced.[3] In reaching its conclusion, the court narrowly interpreted the Supreme Court's decision in *Rock v. Arkansas*[4] and stated that any constitutional protection granted to the defendant in presenting hypnotically enhanced testimony as part of the defense was restricted to the testimony of the defendant in a criminal trial.[5] The court supported its holding by emphasizing that hypnosis as a memory enhancer was not accepted in the relevant scientific community and thus failed to satisfy the *Frye* standard.[6] In the same breath, the court af-

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1. 352 Md. 707, 724 A.2d 65 (1999).

2. *Id.* The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; *to have compulsory process for obtaining witnesses in his favor*, and to have Assistance of Counsel for his defense.

U.S. CONST. amend. VI (emphasis added). The Fourteenth Amendment, section one, states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

3. *Burral*, 352 Md. at 741, 724 A.2d at 81.

4. 483 U.S. 44, 62 (1987) (holding that Arkansas's per se rule excluding all post-hypnosis testimony infringed impermissibly on the right of a defendant to testify on his own behalf); *see also infra* notes 119-130 (discussing the holding in *Rock v. Arkansas*).

5. *Burral*, 352 Md. at 730, 724 A.2d at 76 (referring to the Supreme Court's reasoning in *Rock v. Arkansas* that the Fifth, Sixth, and Fourteenth Amendments give the defendant in a criminal trial the constitutional right to present his own hypnotically enhanced testimony as part of his defense); *see also infra* notes 119-130 (discussing the holding in *Rock v. Arkansas*).

6. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (establishing a standard to evaluate the admissibility of scientific evidence testimony based on reliability of the evidence in the relevant scientific community); *see also* Reed v. State, 283 Md. 374, 389, 391 A.2d 364, 372 (1978) (adopting the *Frye* standard in Maryland to govern the admissibility of

firmed the use of hypnosis as a valid and acceptable tool for police investigations.[7] In so ruling, the court denied the defendant his fundamental rights guaranteed under both the Sixth and Fourteenth Amendments. Furthermore, the majority allowed the State, in the early part of its investigation, to expose a potential defense witness to hypnosis and, as a result, eliminated the possibility of using that witness's testimony as part of the defense.

1. The Case.—In the early morning of February 27, 1989, Jeffrey Fiddler's body was found in a ditch next to Interstate 81 in Pennsylvania, just over the Pennsylvania/Maryland border.[8] The medical examiner determined that the cause of death was a stab wound to the chest, causing heavy bleeding and that it was likely that death occurred within a half-hour of the injury.[9] Based in part on the fact that there was very little blood in the area where the body was found, the Pennsylvania police determined that the death had occurred elsewhere and that the body had been moved after death.[10]

After a preliminary investigation, the Pennsylvania authorities concluded that the crime had probably been committed in Maryland, and the Hagerstown police force joined the Pennsylvania police in the investigation.[11] Initially, the investigators' primary suspect was Robert Schell, and in August 1989, Schell was arrested.[12] Schell was soon released when Jimmy Fiddler, the victim's brother, exonerated him.[13] Later in the investigation, the Hagerstown police learned that the defendant, Lewis William Burral, had met with Jeffrey Fiddler and Eddie and Willie Stouffer in Clear Spring, Maryland, on the night of the murder.[14] The men met at the home of Willie Stouffer's girlfriend and drove into the mountains.[15] While in the mountains, according to one of Burral's inconsistent statements to the police, Eddie Stouffer

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expert opinion evidence based on scientific technique); Hutton v. State, 339 Md. 480, 494 n.10, 663 A.2d 1289, 1295-96 n.10 (1995) (reaffirming the *Frye/Reed* standard despite the Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 585-87 (1993), that the *Frye* test was superceded by the Federal Rules of Evidence).

7. *Burral*, 352 Md. at 740, 724 A.2d at 81.

8. *See id.* at 709, 724 A.2d at 65-66.

9. *See* Burral v. State, 118 Md. App. 288, 291, 702 A.2d 781, 782 (1997), *aff'd by* Burral v. State, 352 Md. 707, 724 A.2d 65 (1999).

10. *See Burral*, 352 Md. at 709, 724 A.2d at 66.

11. *See id.* The victim was a resident of Hagerstown, Maryland. *See id.*

12. *See id.* at 710, 724 A.2d at 66.

13. *See id.* at 710-11, 724 A.2d at 66.

14. *See Burral*, 118 Md. App. at 292, 702 A.2d at 783 (noting that this was just one of several versions of the events occurring the night of the murder encountered by the police during their investigation).

15. *See id.* at 295, 702 A.2d at 784.

stabbed Jeffrey Fiddler.[16] Then, Burral and Stouffer put the body in the back of the car, and soon after, dumped the body into the ditch where it was discovered the next day.[17]

Burral was arrested for the murder in September 1995.[18] The issue of hypnotically enhanced testimony arose at trial when the defendant attempted to introduce the testimony of Lisa Wallech, the victim's girlfriend at the time he was killed.[19] The trial court excluded the testimony.[20] Wallech's post-hypnotic account of the evening was important to the defense because it placed responsibility for the murder on Schell and not on Burral.[21] In addition, Wallech's account directly contradicted the testimony of Jimmy Fiddler, a witness for the State.[22] Jimmy Fiddler testified that on the evening of his brother's murder, he, Schell, and several others, including Lisa Wallech, gathered at Schell's home.[23] At some point in the evening, Jimmy and Schell got into an argument.[24] According to Jimmy, he attempted to leave, but Schell followed him, and the two got into a wrestling match in front of the house.[25] Jimmy stated that his brother, Jeffrey, was not there that evening and had not been involved in any fight with Schell.[26]

The police in the beginning of the investigation interviewed Wallech, and on August 25, 1999, she gave a written statement to a police detective named Johnson, generally confirming the account given by Jimmy Fiddler and by Schell.[27] Wallech stated that she, Schell, Jimmy, and a few other people, not including Jeffrey, were at Schell's apartment "partying" and drinking beginning at 7:30 in the evening.[28] Sometime between 2:30 to 3:00 am, Wallech stated that she saw Jimmy and Schell fighting outside.[29] At the time that Wallech gave that statement, Schell was the primary suspect and had already been arrested.[30] Detective Johnson asked Wallech repeatedly if she was sure that the

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16. *See Burral*, 352 Md. at 711, 724 A.2d at 67.
17. *See id.*
18. *See id.*
19. *See id.* at 713, 724 A.2d at 67.
20. *See id.* at 716, 724 A.2d at 69.
21. *See id.* at 715, 724 A.2d at 69.
22. *See id.* at 714-15, 724 A.2d at 68-69.
23. *See id.* at 713, 724 A.2d at 68.
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.* Schell's factual account of the evening was the same as Jimmy Fiddler's version. *See id.*
28. *See id.*
29. *See id.*
30. *See id.*

fight had occurred between *Jimmy* Fiddler and Schell, and not between Schell and *Jeffrey* Fiddler.[31] Wallech confirmed that the fight was between Jimmy and Schell, and stated that she could "almost swear it."[32] Detective Johnson repeatedly pressed her on this point, and when still unconvinced, Detective Johnson arranged for Ms. Wallech to be hypnotized.[33]

On September 15, 1989, Maryland State Police Sergeant Dan Seiler conducted the scheduled hypnosis session with Lisa Wallech.[34] During the hypnosis session, Sergeant Seiler obtained a different version of the events occurring on February 26, 1989, and February 27, 1989.[35] Under hypnosis, Wallech recalled and was "positive" that the fight that she had witnessed on the night of the murder was between Schell and Jeffrey and not between Schell and Jimmy.[36] She also recalled that during the fight, she saw Schell hit Jeffrey with a knife and that Jeffrey's back and hands were slashed.[37] Wallech stated that she had consumed "at least 12 to 13 beers" that evening and was unable, prior to the hypnosis, to remember the fight because she had been "under the influence of alcohol."[38]

When Burral called Wallech as a witness at trial, the State objected to any testimony beyond what Wallech had told the police prior to the hypnosis.[39] Wallech identified the August 25, 1989 pre-hypnosis statement that she had given to the police and confirmed that it accurately recorded what she had said at the time.[40] She also identified the post-hypnosis statement given on September 16, 1989.[41] After hearing the argument, the trial court "determined that Wallech's memory as to who was fighting with Schell was inextricably tied to the hypnosis and that any testimony as to that matter would therefore be inadmissible."[42]

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31. *See id.* at 714, 724 A.2d at 68.

32. *See id.* (internal quotation marks omitted).

33. *See id.* (internal quotation marks omitted).

34. *See id.*

35. *See id.*

36. *See id.* at 714-15, 724 A.2d at 68.

37. *See id.* at 715, 724 A.2d at 68. According to Wallech, "the fight was not just a wrestling match or fistfight." *Id.*; *see also supra* note 25 (referring to Jimmy Fiddler's statement that the fight was a wrestling match).

38. *Burral*, 352 Md. at 715, 724 A.2d at 68-69 (internal quotation marks omitted).

39. *See id.*, 724 A.2d at 69.

40. *See id.* at 715-16, 724 A.2d at 69.

41. *See id.* at 716, 724 A.2d at 69.

42. *Id.*

Based on the evidence presented, Burral was convicted of second-degree murder and sentenced to imprisonment for thirty years.[43] The Court of Special Appeals affirmed that judgment,[44] and the Court of Appeals granted certiorari to consider whether the court erred in affirming the exclusion of Wallech's hypnotically enhanced testimony.[45]

2. *Legal Background.*—

a. *The Sixth Amendment's Compulsory Process Clause and the Nature of Fundamental Rights under the Fourteenth Amendment's Due Process Clause.*—In *Gideon v. Wainwright*,[46] the United States Supreme Court recognized that defendants in criminal state trials had certain fundamental rights, stating that provisions of the Bill of Rights that are "'fundamental and essential to a fair trial' [are] made obligatory upon the States by the Fourteenth Amendment."[47] In *Gideon*, the Supreme Court reviewed whether an indigent defendant in a criminal prosecution in a state court had a constitutional right to have counsel appointed for him.[48] The Court answered in the affirmative,

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43. *See id.*

44. *See* Burral v. State, 118 Md. App. 288, 293, 702 A.2d 781, 783 (1997).

45. *See Burral*, 352 Md. at 716, 724 A.2d at 69.

46. 372 U.S. 335 (1963).

47. *Id.* at 342 (affirming the general assumption in *Betts v. Brady*, 316 U.S. 455, 473 (1942), that "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right . . ." but overruling *Betts*'s ultimate holding that the Constitution does not guarantee the assistance of counsel); *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 3.02B, at 44 (1997) ("[A] right is fundamental if: it is 'of the very essence of a scheme of ordered liberty; a 'fair and enlightened system of justice would be impossible without [it]'; it is 'at the base of all our civil and political institutions'; its denial would 'offend those canons of decency and fairness which express the notions of justice of English-speaking people'; or it is 'fundamental to the American scheme of justice'; or conduct in derogation of the right 'shocks the conscience.'").

48. *See Gideon*, 372 U.S. at 338 (granting certiorari to determine whether the Court's holding in *Betts v. Brady*, 316 U.S. 455 (1942), should be reconsidered). In *Betts*, the defendant was indicted for robbery, and due to lack of funds, was unable to obtain the assistance of counsel. *Betts*, 316 U.S. at 457. Betts asked the court to appoint counsel for him, but his request was denied, and he was later found guilty by the Maryland state court. *See id.* While serving his sentence, he filed "a petition for a writ of *habeas corpus* alleging that he had been deprived of the right to assistance of counsel guaranteed by the Fourteenth Amendment of the Federal Constitution." *Id.* The United States Supreme Court awarded the writ of habeas corpus but ultimately held that the assistance of counsel was not a fundamental right guaranteed by the Fourteenth Amendment. *Id.* at 473.

The *Gideon* Court recognized that the facts in *Gideon* bore a remarkable similarity to those in *Betts*, and acknowledged that if *Betts*'s holding was left standing, Gideon's claim would have to be denied. *Id.* at 339. The Court stated:

> Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts v. Brady* holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that *Betts v. Brady* should be overruled.

characterizing the defendant's Sixth Amendment right to counsel as a fundamental right and applying the Sixth Amendment to the states through incorporation into the due process clause of the Fourteenth Amendment.[49]

In *Washington v. Texas*,[50] the United States Supreme Court considered whether a defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor [in a criminal trial was] . . . applicable to the States through the Fourteenth Amendment."[51] In *Washington*, the criminal defendant was denied the use of the eyewitness testimony of a co-conspirator because a state statute made such testimony inadmissible and was subsequently convicted.[52] The Supreme Court reversed.[53] Chief Justice Warren delivered the opinion of the Court, stating that "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense."[54] The Court explained that like other rights guaranteed by the Sixth Amendment,[55] the accused had the right to present his own witnesses to establish a defense and that this right was a fundamental element of due process of law.[56] The

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Id.

49. *See Gideon*, 372 U.S. at 342-45; *see also supra* note 2 (providing the text of the Sixth Amendment). All the rights guaranteed by the Sixth Amendment after *Gideon*, have subsequently been held to be fundamental. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (right to trial by jury); Washington v. Texas, 388 U.S. 14, 18 (1967) (right to compulsory process and right to public trial); Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (right to speedy trial); Pointer v. Texas, 380 U.S. 400, 403 (1965) (right to confront witnesses); *see also* Jennie L. Caissie, *Passing the Victims' Rights Amendment: A Nation's March Toward a More Perfect Union*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 647, 661 (1998). According to Caissie,

> [t]he Warren Court, in addressing which fundamental rights are owed to criminal defendants in both state and federal courts, expanded the defendant's rights, by incorporating them into the Fourteenth Amendment. The Supreme Court made the Bill of Rights a reality for all defendants in criminal proceedings. In doing so, the Court safeguarded the fundamental rights of the individual, from the dangers posed by both the federal and state governments.

Id. at 661 (footnotes omitted).

50. 388 U.S. 14 (1967).

51. *See id.* at 14-15.

52. *See id.* at 19. The two Texas statutes at issue "provided . . . that persons charged or convicted as coparticipants in the same crime could not testify for one another," although they could testify for the State. *Id.* at 16-17 (citations omitted).

53. *See id.* at 23.

54. *Id.* at 19.

55. *See id.* (referring to the Sixth Amendment's confrontation clause); *see also supra* note 49 and accompanying text (discussing the incorporation of all clauses within the Sixth Amendment into the Due Process Clause of the Fourteenth Amendment).

56. *Washington*, 388 U.S. at 19 ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of law.").

Court also commented that it was difficult to see how arbitrary rules preventing whole categories of defense witnesses from testifying, based on a presumption that they were not credible, could be constitutional.[57] Therefore, the Court concluded that the petitioner had been "denied his right to have compulsory process for obtaining witnesses in his favor because the State had arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[58]

The Supreme Court affirmed its recognition of the applicability of the Sixth Amendment's compulsory process clause to the states through the Fourteenth Amendment in *Chambers v. Mississippi*.[59] In *Chambers*, the trial court had applied Mississippi hearsay rules to exclude vital portions of the testimony of three key defense witnesses.[60] After the Mississippi Supreme Court affirmed the conviction, the Supreme Court granted certiorari.[61] The Supreme Court reversed, holding that the exclusion of critical evidence under the hearsay rule,[62] coupled with the state's refusal to permit the defendant to cross-ex-

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57. *Id.* at 22. The Court stated:

> In light of the common-law history, and in view of the [Court's] recognition . . . that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

Id.

58. *Id.* at 23. The Court explained that the framers of the Constitution did not intend to give a defendant the right to secure the attendance of witnesses, and then refuse to allow the witness to present her testimony. *See id.*

59. 410 U.S. 284 (1973).

60. *Id.* at 292-93.

61. *Id.* at 285; *see also* Chambers v. State, 252 So. 2d 217, 220 (Miss. 1971) (affirming Chambers's conviction).

62. *See id.* at 298.

> The hearsay rule . . . is . . . grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.

Id. (citing California v. Green, 399 U.S. 149, 158 (1970)).

amine a witness, denied him a fair trial in accordance with traditional and fundamental standards of due process.[63]

The *Chambers* Court noted that the hearsay comments involved were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability.[64] The Court concluded by emphasizing the importance of the compulsory process clause, stating that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense,"[65] and that "where constitutional rights directly affecting the ascertainment of guilt are implicated,"[66] a state evidentiary rule, in this case, the hearsay rule, "may not be applied mechanistically to defeat the ends of justice."[67]

One year later, the Supreme Court, in *United States v. Nixon*,[68] issued another decision discussing compulsory process and due process rights as related to the availability of evidence. In *Nixon*, the Court recognized that the right to the production of all evidence at a criminal trial was constitutionally based and that "[t]he Sixth Amendment explicitly confer[red] upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and to have compulsory process for obtaining witnesses in his favor."[69] The Court emphasized that "[t]he very integrity of the judicial system . . . depend[s] on full disclosure of all the facts . . . . To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."[70] The Court also addressed the Fifth Amendment's guarantee of due process and emphasized that for

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63. *See id.* at 302 ("We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process.").

64. *See id.* at 300 (noting that the declarant's confessions were made spontaneously and shortly after the murder had occurred, that each hearsay statement was corroborated by other evidence in the case, including multiple independent confessions, and that the confession in this case was self-incriminating and against the declarant's own interest).

65. *Id.* at 302 (citations omitted).

66. *Id.*

67. *Id.*

68. 418 U.S. 683 (1973). In *Nixon*, the President of the United States was issued a subpoena duces tecum to compel production of tape recordings and documents containing important information, which were unavailable from any other source. *See id.* at 686. The President challenged the subpoena, claiming that he had a privilege against disclosure of confidential communications. *See id.* at 688.

69. *Id.* at 711.

70. *Id.* at 709.

the courts to protect effectively this guarantee, it was essential that all relevant and admissible evidence be produced.[71]

b. Hypnotically Enhanced Testimony.—In the last thirty years, courts and scholars have struggled to resolve whether hypnotically enhanced testimony should be admitted in criminal trials.[72] While some courts were loath to keep out a possible means of discovering the truth, other courts feared that hypnosis would produce unreliable results and serve as a potential tool for fabrication of testimony.[73] In addressing this dilemma, courts have taken a number of approaches to control the presentation of hypnotically enhanced testimony in criminal trials.[74]

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71. *See id.* at 711 ("[T]he Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced."); *see also* 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONST. L. § 18.41, at 799 & n.3 (3d ed. 1999) ("The due process clause of the fifth amendment, like the due process clause of the fourteenth amendment, guarantees a defendant a fair process . . . .").

72. *See, e.g.*, Francis P. Kuplicki, *Fifth, Sixth, and Fourteenth Amendments—A Constitutional Paradigm for Determining the Admissibility of Hypnotically Enhanced Testimony*, 78 J. CRIM. L. & CRIMINOLOGY 853 (1988) (arguing that hypnotically enhanced testimony offered by the defense in criminal trials should generally be admitted and that hypnotically refreshed testimony offered by the prosecution should generally be excluded); Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1, 6-13 (1991) (reviewing the history of hypnotically enhanced testimony in criminal trials and concluding that it should never be admissible).

73. *See, e.g.*, State v. Collins, 296 Md. 670, 702-03, 464 A.2d 1028, 1044-45 (1983) (finding hypnotically enhanced testimony too unreliable, and thus, inadmissible); Harding v. State, 5 Md. App. 230, 246-47, 246 A.2d 302, 311-12 (1969) (allowing the use of hypnotically enhanced testimony and permitting the trier of fact to evaluate its credibility).

74. The various perceptions of the value of hypnotically enhanced testimony are most clearly illustrated by state evidentiary rulings issued prior to the Supreme Court's holding in *Rock v. Arkansas*, 483 U.S. 44 (1987) (holding Arkansas's per se rule excluding all post-hypnotic testimony unconstitutional because it "infring[ed] impermissibly on the right of a defendant to testify on his own behalf"). Courts took five different positions with respect to testimony based on hypnotically enhanced memory. First, courts have admitted the testimony and allowed the trier of fact to evaluate its admissibility. *See, e.g.*, Harding v. State, 5 Md. App. 230, 236, 246 A.2d 302, 306 (1969) (stating that a witness's varying testimony after being exposed to hypnosis "concerns the question of the weight of the evidence which the trier of facts . . . must decide"). Second, courts have excluded all hypnotically enhanced testimony due to its unreliability. *See, e.g.*, People v. Shirley, 723 P.2d 1354, 1377 (Cal. 1982) (holding that the "testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events" due to its unreliability). Third, courts have admitted testimony based on hypnotically enhanced recollections provided that certain safeguards were employed to assure that the testimony was not improperly influenced by the hypnosis. *See, e.g.*, State v. Hurd, 432 A.2d 86, 95 (N.J. 1981) (admitting hypnotically enhanced testimony in a criminal trial but allowing the opponent the opportunity to challenge the reliability of the particular procedures followed in the particular case as long as the opponent does not

In the early stages of this debate, Maryland courts addressed the issue of hypnotically enhanced testimony in terms of its weight or credibility as a result of that enhancement rather than focusing on its admissibility.[75] In *Harding v. State*,[76] the Court of Special Appeals held that, although the victim had given inconsistent accounts before and after her hypnosis, this variation and the exposure to the hypnosis itself affected only the credibility of her testimony and not its admissibility.[77] The court based its decision on the following factors: the hypnotic procedure did not contain any improper suggestions; the hypnotist was trained and experienced; and the jury had been properly informed of the use of hypnosis.[78] The court also emphasized that modern medical science had recognized the ability of hypnosis to restore the memory lost by painful events and therefore could serve as a useful tool in recovering this type of memory.[79]

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attempt to prove the general unreliability of hypnosis). Fourth, courts have allowed the admission of testimony based on and consistent with the witness's recollections recorded prior to the hypnosis. *See, e.g.*, State v. Collins, 296 Md. 670, 702, 464 A.2d 1028, 1044 (1983) (finding that a person should "be permitted to testify in court in accord with statements which it clearly can be demonstrated he made prior to hypnosis"). Fifth, courts have determined whether in view of the totality of circumstances, the proposed testimony is sufficiently reliable to merit admission. *See, e.g.*, State v. Iwakiri, 682 P.2d 571, 578 (Idaho 1984) (adopting a rule with respect to hypnotically enhanced testimony in which "[t]rial judges should . . . apply a 'totality of the circumstances' test and make a determination whether, in view of all the circumstances, the proposed testimony is sufficiently reliable to merit admission"); *see also Burral*, 352 Md. at 716-29, 724 A.2d at 69-76 (discussing the aforementioned approaches that courts used in addressing the use of hypnotically enhanced testimony).

75. *See Burral*, 352 Md. at 718, 724 A.2d at 70 (noting that the first approach to hypnotically enhanced testimony was inaugurated in *Harding v. State*, 5 Md. App. 230, 236, 246 A.2d 302, 306 (1969), which stated "that the fact that a witness's memory was hypnotically enhanced goes only to the weight or credibility of the testimony based on that enhancement, not to its admissibility").

76. 5 Md. App. 230, 246 A.2d 302 (1969).

77. *Id.* at 236, 246 A.2d at 306 ("The fact that . . . [the victim] has told different stories or had achieved her present knowledge after being hypnotized concerns the question of weight of the evidence which the trier of facts . . . must decide." (citing Borman v. State, 1 Md. App. 276, 229 A.2d 440 (1967); Carroll v. State, 3 Md. App. 50, 237 A.2d 535 (1968); Thompson v. State, 4 Md. App. 31, 240 A.2d 780 (1968))).

78. *See id.* at 246, 246 A.2d at 312.

79. *See id.* at 246, 246 A.2d at 311-12. At the time the court decided *Harding*, Maryland had not yet adopted the *Frye* standard for evaluating evidence based on novel scientific techniques. *See infra* notes 83-87 and accompanying text (discussing the *Frye* decision); *infra* note 107 (discussing Maryland's adoption of the *Frye* standard in *Reed v. State*); *infra* note 93 (discussing Maryland's reaffirmation of the *Frye* standard despite the Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*); *see also infra* note 87 and accompanying text (discussing *Daubert*).

The *Harding* approach was increasingly criticized as the psychology of memory and the use of hypnosis in a forensic setting[80] became better understood.[81] The primary reason for the rejection of the *Harding* approach was the recognition that hypnosis was a scientific technique that should be subjected to the standard for evaluating scientific evidence set forth in *Frye v. United States*.[82]

In *Frye*, the defendant offered the testimony of an expert witness as to the result of a deception test given to the defendant.[83] The defense asserted that blood pressure was influenced by a change in the emotions of the witness and that increases in the systolic blood pressure stemmed from nervous impulses sent to the sympathetic branch of the autonomic nervous system.[84] The theory was based on the idea that "truth is spontaneous and comes without conscious effort, while the utterance of a falsehood requires conscious effort, which is re-

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80. *See* WHITNEY S. HIBBARD & RAYMOND W. WORRING, FORENSIC HYPNOSIS (1981) (discussing the use of 'forensic hypnosis' in a forensic setting).

81. *See Burral*, 352 Md. at 720, 724 A.2d at 71 (articulating that the rejection of *Harding*'s liberal admissibility approach came with the "recognition that hypnosis was, indeed, a scientific technique that should be subjected to the *Frye* standard."); *see infra* notes 83-94 (discussing the *Frye* standard and its origination); *see also* Bernard L. Diamond, *Inherent Problems in the Use of PreTrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 323 (1980) (arguing that the *Harding* decision might have come out differently if the courts had taken into account the more 'current' understanding of the use of hypnosis in a legal setting). Diamond stated:

> Perhaps if the *Harding* trial and appellate courts had been presented a more accurate description of the nature of hypnosis and the extreme vulnerability of the subject to suggestion, they might have been less disposed to admit the evidence, and the subsequent trend of the law might have been different.

Id.

Diamond criticized the use of hypnotically enhanced testimony throughout his article. *See generally id.* (discussing the problems associated with hypnotically enhanced testimony). He argued that "once a potential witness has been hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify." *Id.* at 314. In rejecting *Harding*, the courts often referred to Diamond's article, in addition to the writings of several other authors. *See Burral*, 352 Md. at 71, 724 A.2d at 720 (noting the courts' reference to Diamond's article); State v. Collins, 296 Md. 670, 695-97, 464 A.2d 1028, 1041-42 (1983) (referring and quoting numerous excerpts from Dr. Diamond's article in support of its holding that hypnotically enhanced testimony should not be admitted).

82. 293 F. 1013, 1013 (D.C. Cir. 1923) (holding that the basis of expert testimony must be generally accepted in the relevant scientific community to be admissible); *see also Burral*, 352 Md. at 720, 724 A.2d at 71 ("The principal basis for the rejection of a liberal admissibility approach was the recognition that hypnosis was, indeed, a scientific technique that should be subjected to the *Frye* standard."); *Collins*, 296 Md. at 678, 464 A.2d at 1032-33 (stating that "[t]he majority of courts which have considered hypnosis as it affects testimony of a witness have applied the test laid down in *Frye v. United States* . . . although they may not in every instance have referred to *Frye*.").

83. *Frye*, 293 F. at 1013.

84. *See id.*

flected in the blood pressure."[85] The court held that in admitting expert testimony, the principle from which the testimony was deduced must be generally accepted in the relevant scientific community.[86] The court reasoned that *Frye*'s deception test had not gained enough scientific recognition, and therefore, was inadmissible.[87]

In *Reed v. State*,[88] Maryland adopted the *Frye* standard, stating that "[t]estimony based on a technique which is found to have gained 'general acceptance in the scientific community' *may* be admitted into evidence."[89] The issue in *Reed* was whether voice identification testimony based on the analysis of spectrograms ('voiceprints') could be admitted in a criminal trial.[90] The court classified the voiceprint analysis as "expert testimony based on the application of new scientific techniques," and recognized that before the court would admit such testimony, reliability of the testimony needed to be demonstrated.[91] Because the "reliability of a scientific technique or process does not vary according to the circumstances of each case," the court stated that "considerations of uniformity and consistency of decision-making require that a legal standard or test be articulated by which the reliability of a process may be established."[92] Accordingly, the court adopted the *Frye* standard, and held that 'voiceprint' analysis had not

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85. *See id.* at 1014.

86. *See id.*

87. *See id.* (explaining that "the systolic blood pressure deception test [had] not yet gained such standing and scientific recognition among the physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made").

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court revisited *Frye* to determine whether *Frye*'s 'general acceptance' test for the admissibility of scientific evidence was till valid. 509 U.S. 579, 585-87 (1993). The Court found "that the Frye test was superseded by the adoption of the Federal Rules of Evidence." *Id.* at 587. Finding the *Frye* test unnecessarily rigid, *Daubert* offered in its place a flexible, non-inclusive inquiry under Federal Rule of Evidence 702, which required trial judges to consider: (1) a technique's know or potential error rate; (2) whether the theory or technique can be or has been tested; (3) whether it has been subject to peer review and publication; and (4) its general acceptance. *Id.* at 593-94. The Court emphasized that Rule 702 was intended to be flexible, and that the "overarching subject [of the inquiry] is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." *Id.* at 594-95. Federal Rule of Evidence 702 states "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

88. 283 Md. 374, 391 A.2d 364 (1978).

89. *Id.* at 389, 391 A.2d at 372 (citation omitted).

90. *See id.* at 375-76, 391 A.2d at 364-65.

91. *Id.* at 380, 391 A.2d at 367.

92. *Id.* at 380-81, 391 A.2d at 367-68.

achieved the general acceptance in the scientific community as required by *Frye*.[93]

A New Jersey case, *State v. Hurd*,[94] illustrates one of the ways in which courts have approached the issue of hypnotically enhanced testimony in the wake of *Frye*. In *Hurd*, the Supreme Court of New Jersey held that to be admissible, hypnotically enhanced testimony must satisfy the *Frye* standard for admissibility of scientific evidence.[95] According to the *Hurd* court, hypnotically enhanced testimony would be admissible only if there was a "sufficient scientific basis to produce uniform and reasonably reliable results and contribute materially to the ascertainment of truth."[96] The court addressed the risk of the subject's vulnerability to suggestion during hypnosis, but nonetheless determined that a per se rule of inadmissibility was unnecessarily broad and might result in the exclusion of evidence at least as trustworthy as other eyewitness testimony.[97] The court concluded that hypnotically enhanced testimony was admissible in a criminal trial where the trial court finds that the use of hypnosis in the particular case is reasonably likely to result in recall comparable in accuracy to normal human memory.[98] However, because the court also recognized that if improperly used, hypnosis could produce extremely unreliable results, it adopted several specific safeguards, requiring proof

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93. *See id.* at 399, 391 A.2d at 377; *see also* Hutton v. State, 339 Md. 480, 494 n.10, 663 A.2d 1289, 1295-96 n.10 (1995) (responding to the Supreme Court's *Daubert* decision by reaffirming the *Frye-Reed* standard). The court in *Hutton* supported its decision by explaining:

> [O]n July 1, 1994, this Court adopted Maryland Rules of Evidence patterned after the federal rules. Our counterpart to Federal Rule of Evidence 702 is Md. R. Evid. 5-702. As a committee note makes clear, however, the adoption of the Rules "is not intended to overrule *Reed* . . . and other cases adopting the principles enunciated in *Frye* . . . . The required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law."

Id. Md. Rule of Evidence 5-702 states:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

See also supra note 87 (setting forth the text of FED. R. EVID. 702).

94. 432 A.2d 86 (N.J. 1981).

95. *See id.* at 91.

96. *Id.* (internal quotation marks omitted) (quoting State v. Cary, 230 A.2d 384, 389 (N.J. 1967)).

97. *Id.* at 94. The court also noted that research on the reliability of ordinary eyewitness testimony had revealed shortcomings similar to those present in hypnotically enhanced testimony. *Id.*

98. *Id.* at 95.

of the hypnotist's competency and the recording of statements both before and after the hypnosis.[99]

After the *Hurd* decision, many courts adopted the same safeguards enunciated by the New Jersey court, while others developed similar safeguards to control the admissibility of hypnotically enhanced testimony.[100] A number of courts have determined, however, that such procedural safeguards could not overcome the inherent unreliability of hypnotically enhanced testimony and that case-by-case determinations would be too burdensome.[101] Therefore, these courts concluded that hypnotically enhanced testimony was per se inadmissible, or only admissible if the information conveyed in the testimony was known prior to the hypnotic session.[102]

Maryland was one of the jurisdictions that chose to follow this latter approach. In 1983, in *State v. Collins*,[103] the Maryland Court of Appeals overruled *Harding v. State*,[104] and changed its position with regard to hypnotically enhanced testimony.[105] The *Collins* court re-

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99. *See id.* at 96-97. The complete list of requirements imposed by the court as a condition of the admissibility of hypnotically enhanced testimony are: (1) an experienced psychiatrist or psychologist must conduct the session; (2) the hypnotist must be independent of defense or prosecution; (3) information given to the hypnotist by law enforcement personnel of the defense must be recorded; (4) the hypnotist must obtain a statement of facts from the subject prior to hypnosis; (5) all contacts between the hypnotist and subject must be recorded; and (6) only the hypnotist and subject may be present during the hypnotic session. *Id.*

100. *See, e.g.*, State v. Beachum, 643 P.2d 246, 253-54 (N.M. Ct. App. 1981) (adopting *Hurd* safeguards); State v. Armstrong, 329 N.W. 2d. 386, 394 n.23 (Wis. 1983) (adopting *Hurd* safeguards).

101. *See* State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1294 (Ariz. 1982) (supplemental opinion) (rejecting procedural safeguards such as those adopted in *Hurd* and stating that "the case-by-case determination under a set of safeguards will consume too much in the way of judicial resources"); People v. Shirley, 723 P.2d 1354, 1365-66 (Cal. 1982) (declining to adopt a set of safeguards similar to those adopted in *Hurd*, reasoning that such requirements may not "forestall each of the dangers at which they are directed," that "certain dangers are not ever addressed by the *Hurd* requirements," and expressing "grave doubts that [the safeguards] could be administered in practice without injecting undue delay and confusion into the judicial process").

102. *See, e.g., Collins*, 644 P.2d at 1294-95 (holding that the rule against admitting hypnotically enhanced testimony was one of per se inadmissibility, but that "[a] witness will be permitted to testify with regard to those matters which he or she was able to recall *and* relate prior to hypnosis"); *Shirley*, 723 P.2d at 1383-84 (stating that hypnotically enhanced testimony could never be admitted under the *Frye* test due to its unreliability); *see also infra* notes 105-108 and accompanying text (discussing *State v. Collins*, 296 Md. . 670, 464 A.2d 1028 (1983), which reached a similar conclusion).

103. 296 Md. 670, 464 A.2d 1028 (1983).

104. *See supra* notes 76-79 and accompanying text (discussing the *Harding* decision).

105. *See Collins*, 296 Md. at 702, 464 A.2d at 1044 (1983) ("We are not satisfied that hypnotically enhanced testimony meets the *Frye-Reed* test.").

fused to adopt safeguards like those used in *Hurd*,[106] holding instead that hypnotically enhanced testimony was inadmissible in criminal trials because of its failure to satisfy the *Frye/Reed* test.[107] The court rejected the possibility that the *Hurd* safeguards would effectively eliminate the dangers of unreliable testimony, and added that "even if requirements could be devised that were adequate in theory, [the court] would have grave doubts that they could be administered without injecting undue delay and confusion into the judicial process."[108]

As a third alternative, a number of courts developed a "totality of the circumstances" test to determine whether the trial testimony of a previously hypnotized witness was reliable. This approach was first enunciated in *State v. Iwakiri*.[109] The Supreme Court of Idaho held that in determining the admissibility of hypnotically enhanced testimony, the circumstances surrounding the hypnotic session should be examined in light of suggested safeguards.[110] If in considering the totality of the circumstances, it appeared that the testimony was sufficiently reliable, then the testimony would be admitted.[111] In reaching its decision, the court noted that a per se rule of admissibility would in some circumstances allow for admission of unreliable testimony, while a per se rule of inadmissibility would in some circumstances exclude reliable testimony.[112] According to the court, exclusion of reliable testimony would thwart the truth-seeking function of the judicial sys-

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106. *See id.* at 700, 464 A.2d at 1043-44 (declining to follow the procedures outlined in *Hurd* for the reasons explained in *Shirley*, 723 P.2d at 1365-66).

107. *See id.* at 702, 464 A.2d at 1044 ("We are not satisfied that hypnotically enhanced testimony meets the *Frye-Reed* test.").

108. *Collins*, 296 Md. at 701, 464 A.2d at 1044 (quoting *Shirley*, 723 P.2d at 1366).

109. 682 P.2d 571 (Idaho 1984).

110. *Id.* at 578 (stating that "[t]rial judges should . . . apply a 'totality of the circumstances' test and make a determination whether, in view of all the circumstances, the proposed testimony is sufficiently reliable to merit admission").

111. *See id.* (expressing the need for "some method of determining the admissibility of [hypnotically enhanced testimony] that will protect against the dangers of hypnosis . . . and yet allow for the receipt of the benefit of memory recall which hypnosis can produce").

112. *See id.* at 577. The court stated:

> a *per se* rule of admissibility would in some circumstances allow for the admission of unreliable testimony, an undesirable result in our judicial system, when [the court] strive[s] to reach verdicts based only on reliable testimony. On the other hand, a *per se* rule of inadmissibility . . . would, in some circumstances, disallow reliable testimony, thus thwarting the truthseeking function of our judicial system.

Id.

tem.[113] Consequently, the court found that the issue rested on witness competency rather than on admissibility.[114]

The Supreme Court of Colorado in *People v. Romero*[115] also adopted a "totality of the circumstances" test to determine the reliability of hypnotically enhanced testimony.[116] The court commented that a "*per se* rule of inadmissibility, even if limited to posthypnotic recollections, [was] unnecessarily broad and might well result in the exclusion of testimony that [has] adequate indicia of trustworthiness and would be helpful to the trier of fact."[117] As a result, the court held "that trial courts must make an individualized inquiry in each case to determine whether the trial testimony of a witness who has been hypnotized will be sufficiently reliable to qualify for admission."[118]

In 1987, the Supreme Court addressed the issue of hypnotically enhanced testimony in *Rock v. Arkansas*.[119] In *Rock*, the question before the Court was whether a criminal defendant's Sixth Amendment right to testify could be restricted "by a state rule that exclude[d] her post-hypnosis testimony."[120] The majority, reflecting on the history of constitutional challenges to state rules that interfered with the right of the defendant to offer testimony, commented that "[j]ust as a state rule may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony."[121] The Court acknowledged that although the defendant did not have an absolute right to present relevant testimony, states could not restrict the defendant's right to testify in a way that was arbitrary or unrelated to the purposes that the restrictions were designed to serve.[122] The Court then pointed out that a per se rule of inadmissibility of post-

113. *See id.*; *see also supra* note 112 and accompanying text (noting that inclusion of unreliable testimony was an undesirable result but exclusion of *reliable* testimony thwarts the entire judicial process).

114. *See id.* at 575 ("The basic issue presented is one of *competency* of a hypnotized witness." (emphasis added)).

115. 745 P.2d 1003 (Colo. 1987).

116. *See id.* at 1017 (stating that in determining the admissibility of hypnotically enhanced testimony "the trial court should consider the totality of circumstances bearing on the issues of reliability" and listing various factors to be determined).

117. *Id.* at 1015.

118. *Id.* at 1016.

119. 483 U.S. 44 (1987).

120. *Id.* at 53.

121. *Id.* at 55.

122. *Id.* at 55-56 ("In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.").

hypnosis testimony prevented the trial court from ever considering the reliability of the testimony.[123] More telling, it "[would] operate[ ] to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced."[124]

As an alternative to a per se rule of inadmissibility, the Court discussed the possibility of safeguards, which could be used to reduce some of the inaccuracies that stem from hypnosis, and the use of corroboration to support the hypnotically enhanced testimony.[125] The Court concluded that a state's legitimate interest in barring unreliable evidence did not justify the per se exclusion of testimony that may be reliable in an individual case.[126] Therefore, the Court held that Arkansas's per se rule excluding all post-hypnotic testimony "infring[ed] impermissibly on the right of a defendant to testify on his own behalf."[127]

In a dissenting opinion, Chief Justice Rehnquist, joined by three other justices, argued that there was "no justification in the Constitution" for the Court's ruling.[128] Chief Justice Rehnquist asserted that both the individual's right to due process and to compulsory process were not absolute and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[129] The dissent concluded that where scientific understanding remained unavailable, the Court should defer to the states in the implementation of their own criminal trial rules and procedures.[130]

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123. *Id.* at 56.

124. *Id.*

125. *Id.* at 60 (noting that "[t]he inaccuracies that the process [of hypnosis] introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards").

126. *Id.* at 61 ("Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections.").

127. *Id.* at 62. The Court clarified that the opinion in *Rock* did not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants, and the Court stressed that it was not expressing an opinion on the issue outside a criminal context. *Id.* at 58 n.15 ("This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue.").

128. *Id.* at 63 (Rehnquist, C.J., dissenting).

129. *Id.* at 64 (quoting Chambers v. Mississippi, 410 U.S. 284 (1973) (citing Washington v. Texas, 388 U.S. 14, 22 (1967))).

130. *Id.* at 65 ("[T]his deference would be at its highest in an area such as this [hypnosis], where, as the Court concedes, 'scientific understanding . . . is still in its infancy.'" (quoting *Rock*, 483 U.S. at 61)).

3. The Court's Reasoning.—In *Burral v. State*, the Court of Appeals held that the defendant's rights to compulsory process and to due process of law did not entitle him to present the hypnotically enhanced testimony of a defense witness.[131] Writing for the majority, Judge Wilner began by summarizing the court's past holdings with respect to hypnotically enhanced testimony.[132] The court first discussed *State v. Collins*, where it concluded that hypnotically enhanced testimony did not meet the test of reliability enunciated in *Reed v. State*, and thus, was inadmissible.[133]

The court then addressed the Supreme Court's decision in *Rock v. Arkansas*.[134] When comparing Maryland's precedent regarding hypnotically enhanced testimony to the Supreme Court's holding in *Rock*, the majority opted for a narrow reading of *Rock*. The Court concluded that a per se rule excluding a defense witness's hypnotically enhanced testimony was constitutional because *Rock*'s holding was limited to the defendant, and did not apply to the testimony of a defense witness.[135]

The court reached its decision by initially laying out a detailed history of the role that hypnosis has played in criminal trials.[136] In addressing *Collins*, the majority noted that at the time *Collins* was decided, the prevailing rule governing the admissibility of expert opinion evidence based on scientific technique was the *Frye* standard, adopted by Maryland in *Reed v. State*.[137] The majority also noted that the *Collins* court had specifically adopted the *Frye/Reed* standard as the

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131. 352 Md. at 741, 724 A.2d at 82.

132. *Id.* at 708-09, 724 A.2d at 65.

133. *Burral*, 352 Md. at 708, 724 A.2d at 65; *see also supra* notes 105-108 and accompanying text (discussing the decision in *State v. Collins*).

134. *Burral*, 352 Md. at 708, 729-33, 724 A.2d at 65, 76-78; *see also supra* notes 119-130 and accompanying text (discussing the decision in *Rock v. Arkansas*).

135. *Id.* at 740-41, 724 A.2d at 81-82. The court stated:

> The *Rock* Court's reference to the right of compulsory process can be given proper effect without extending it beyond what we believe was intended. . . . If the high court believes that the right of compulsory process precludes . . . [the per se exclusion of hypnotically enhanced] . . . testimony of other defense witnesses, it will, in due time, inform us of that belief.

Id.

136. *See id.* at 715-34, 724 A.2d at 69-78 (discussing the different approaches for admission of testimony based on hypnotically enhanced memory that courts have used over the last thirty years); *see also supra* notes 76-130 and accompanying text (explaining the different approaches that courts used with respect to the admission of hypnotically enhanced testimony).

137. *See Burral*, 352 Md. at 717, 724 A.2d at 70 (citing Reed v. State, 283 Md. 374, 391 A.2d 364 (1978)).

basis for evaluation of testimony when a witness has been hypnotized.[138]

After laying out the historical context of hypnosis in criminal trials, the court proceeded to address Burral's contention that the decision in *Rock* necessarily applied to defense witnesses and was not just limited to the defendant.[139] The court first emphasized that Maryland would continue to adhere to the *Frye/Reed* standard as a general standard, as well as the standard applicable to hypnotically enhanced testimony.[140] Upon reviewing the record in the case[141] and independent scientific evidence,[142] the court concluded that hypnosis as a memory enhancer still failed to meet the requirements of admissibility under the *Frye/Reed* standard.[143]

In harmonizing this finding with the Supreme Court's holding in *Rock*, the *Burral* court characterized *Rock* as an exception to the "predominant rule that testimony based on hypnotically enhanced recollections is not admissible," but found no constitutional mandate requiring it to extend that exception to other defense witnesses.[144] The court then addressed the bases of Burral's proposed extension of *Rock* to defense witnesses—the Supreme Court's reference to the Sixth Amendment right to compulsory process in *Rock* and the *Chambers v. Mississippi* decision.[145] The court dismissed Burral's argument, pointing to the Supreme Court's "clear intent to limit its holding to testifying defendants," and noted that the "right to compulsory process [was] a Constitutional source of a *defendant's* right to testify," and a right "that did not exist at common law."[146]

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138. *See id.* (stating that "we commenced our discussion in *Collins* by adopting . . . [the *Frye* standard] specifically 'as the basis for evaluation of testimony where a witness has been hypnotized'" (quoting State v. Collins, 296 Md. 670, 464 A.2d 1028, 1034 (1983))).

139. *See id.* at 737, 724 A.2d at 80 ("The choice that faces us, then, is whether to extend *Rock* beyond the limited scope given it by the Supreme Court itself.").

140. *See id.* at 738, 724 A.2d at 80 ("We have not been asked in this case to abandon *Frye/Reed*, either as a general standard or . . . as the standard applicable to hypnotically-enhanced memory, and we therefore shall not do so.").

141. *See id.* at 738, 724 A.2d at 80 ("There is nothing in the record of this case to indicate that hypnosis as a memory enhancer has gained general acceptance in the relevant scientific community since . . . [the *Collins* decision].").

142. *See id.* at 738-40, 724 A.2d at 80-81 (referring to the evidence against the use of hypnosis in criminal trials as "overwhelming and largely uncontradicted").

143. *See id.* at 739-40, 724 A.2d at 81 ("[W]e find no justification to depart, as a matter of common law, from the approach we took in *Collins*.").

144. *Id.* at 740, 724 A.2d at 81.

145. *See id.* at 734, 724 A.2d at 78; *see also supra* notes 59-67 and accompanying text (discussing the *Chambers* decision).

146. *Id.* at 740, 724 A.2d at 81 (emphasis added).

The court explained that *Rock* was an 'unusual' case because the defendant there was the only live witness to what had occurred, and thus, the only person able to tell her story.[147] The court stated that extending the exception for defendants granted in *Rock* to defense witnesses in criminal trials simply because of *Rock*'s reference to compulsory process would "preclud[e] a State from enforcing neutral and well-founded rules of evidence against defense witnesses."[148] This, the court emphasized, would have profound and negative implications, "well beyond what was at issue in *Rock*."[149] The court therefore concluded that the Supreme Court's reference to the right of compulsory process in *Rock* could be given proper effect without extending it beyond what the court believed was intended—to serve as one of three sources of the right of a defendant to testify in his or her own defense after being exposed to hypnosis.[150]

In a dissenting opinion, Judge Chasanow, joined by Chief Judge Bell, asserted that the majority had misapplied the cited cases and arti-

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147. *Id.* In *Rock*, Vickie Rock shot and killed her husband in the course of an argument and was charged with manslaughter. *See* Rock v. Arkansas, 483 U.S. 44, 45 (1987). When she was unable to remember precise details of the shooting, her attorney suggested that she undergo hypnosis. *See id.* at 46. Rock underwent hypnosis, and afterwards, was able to remember that at the time of the incident, she had her thumb on the hammer of the gun, but had not held her finger on the trigger. *See id.* at 47. She also remembered that the gun had discharged when her husband grabbed her arm during the scuffle. *See id.* This fight occurred in the privacy of the trailer that Vickie owned. *See id.* at 47 n.2.

148. *Burral*, 352 Md. at 740-41, 724 A.2d at 81.

149. *Id.* at 741, 724 A.2d at 81-82. The *Burral* court speculated as to some of the possible implications:

> Would the testimony of a defense witness, who, by reason of tender age or mental disability is unable to understand an oath and is incompetent for that reason, nonetheless be admissible as a Constitutional imperative? Is a defense witness no longer subject to the hearsay rule? . . . Federal Rule of Evidence 605 and its Maryland counterpart, Rule 5-605, provide that the judge presiding at a trial may not testify in that trial as a witness. Would those rules apply if the judge is called as a defense witness?

Id.

150. *Id.* at 741, 724 A.2d at 82. In *Rock*, the Supreme Court established that a defendant had a constitutional right to testify on his own behalf based on three provisions of the Constitution: The defendant's Sixth Amendment right of compulsory process; Fifth Amendment right to testify (or not testify) in one's own defense, and the Fourteenth Amendment's due process guarantee of the right to be heard. *See Rock*, 483 U.S. at 51-52. The Court stated:

> The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. . . . The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony. . . . The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment. . . . The right to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony.

cles concerning hypnosis to create a "rigid, inflexible, illogical, and probably unconstitutional *per se* rule of exclusion precluding a defendant from calling a witness or questioning the witness because the State interrogated that witness under hypnosis."[151]

Judge Chasanow stated that while statements made by a person after exposure to hypnosis were suspect and should generally not be admitted without safeguards, the instant case was distinguishable because the party objecting to the defense witness's post-hypnotic testimony was the *same* party who subjected the witness to the hypnosis.[152] Judge Chasanow argued that if the State, without the consent of the defendant, has subjected a witness to something that may have impaired her memory, the State should then attack the witness's credibility or use her cross-examination instead of insisting that the witness be disqualified.[153]

The dissent then pointed out that Lisa Wallech's testimony could have been exculpatory evidence for the defendant and that the descriptive detail elicited from the hypnotic session was strongly corroborated by the victim's injuries.[154] The application of a per se rule precluding the defense from calling an exculpatory eyewitness because the State chose to have her hypnotized by a State investigative hypnotist denied the defendant due process of law.[155]

Judge Chasanow asserted that although the court's per se inadmissibility test seemed to suggest that post-hypnotic recall could never be reliable enough to be admissible in evidence, this notion was expressly rejected by the Supreme Court in *Rock*.[156] The dissent further argued that the court's analysis of *Rock* ignored the vast amount of historical and constitutional protection for the defendant's right to call witnesses.[157]

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151. *Burral*, 352 Md. at 742, 724 A.2d at 82 (Chasanow, J., dissenting).

152. *See id.*

153. *See id.*

154. *Id.* at 744-45, 724 A.2d at 83.

155. *See id.* at 745, 724 A.2d at 84 ("To apply a *per se* rule precluding the defense from calling this exculpatory eyewitness because the State chose to have her hypnotized by a State investigative hypnotist denies the defendant due process of law.").

156. *Id.* at 749, 724 A.2d at 85 (stating that the court's "view was rejected by the Supreme Court on constitutional grounds in *Rock v. Arkansas*, 483 U.S. 44 (1987)").

157. *Id.* Judge Chasanow emphasized that the defendant had more historical and constitutional protection for the right to call witnesses than to testify himself. *Id.* Chasanow stressed the *Rock* Court's recognition that "[a]t common law criminal defendants were precluded from testifying because of the possible untrustworthiness of a party's testimony." *Id.* (quoting Rock v. Arkansas, 483 U.S. 44, 49 (1987)). Chasanow also pointed out that the Constitution did not contain an express provision granting a defendant the right to testify, while there was an express provision in the Sixth Amendment granting a defendant the right to call witnesses in his favor. *Id.* at 749, 724 A.2d at 86 (citing *Rock*, 483 U.S. at 52).

Judge Eldridge, in a separate dissenting opinion, stated that he would reverse and remand for a new trial for the reasons set forth in that portion of Judge Chasanow's opinion dealing with the Supreme Court's opinion in *Rock v. Arkansas*.[158]

4. Analysis.—The *Burral* court's limited reading of both *Rock* and the right of compulsory process reflects the court's determination to exclude hypnotically enhanced testimony to the extent possible post-*Rock*. Ultimately, this restrictive holding compromises a defendant's Sixth Amendment right to compulsory process and Fourteenth Amendment guarantee of due process of law. In reaching its conclusion to exclude such testimony, the court extracted the bottom line holding of *Rock*,[159] but ignored much of the reasoning that the Supreme Court used in reaching its holding.[160] Through this selective reasoning, the *Burral* court found that the defense witness's testimony did not demand constitutional protection under *Rock* and could be excluded under a per se rule.[161] In this way, the court was able to maintain the applicability of the *Frye/Reed* standard to hypnotically enhanced testimony of a defense witness and arbitrarily exclude such testimony without regard to the circumstances of the particular case.[162]

In addition, the *Burral* court casually dismissed the historical significance and plain language of the compulsory process clause—the right of the accused to put on a defense through the testimony of witnesses. As a result, the *Burral* court gives the State an unfair advantage by affirming the use of hypnosis for the State's investigation, and by arbitrarily denying the defendant from using witnesses subjected by the State to hypnosis based on a per se rule of inadmissibility.

a. Narrow Reading of Rock *and the Problems with the Per Se Inadmissability of Hypnotically Enhanced Testimony.*—In *Rock*, the Supreme Court reasoned that hypnotically enhanced testimony could be sufficiently reliable, and thus, a per se exclusion of such testimony would arbitrarily restrict a defendant's right to testify on his own behalf in

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Moreover, the *Rock* Court "recognized that a defendant's right to testify [was] derived from the defendant's right to call witnesses." *Id.* (analyzing *Rock*, 483 U.S. at 52).

158. *See id.* at 753, 724 A.2d at 88 (Eldridge, J., dissenting).

159. *See supra* note 119 (discussing *Rock*'s holding).

160. *See supra* notes 121-127 (discussing the Court's reasoning in *Rock*).

161. *See Burral*, 352 Md. at 81, 724 A.2d at 740.

162. *See id.* at 65, 724 A.2d at 708 (discussing the per se rule as set forth in previous cases: "The exclusion of hypnotically-enhanced testimony was stated in the form of a per se exclusion; it did not depend on who the witness was, who called the witness to testify; or the circumstances of the case." (citations omitted)).

violation of the Constitution.[163] While the final holding addressed the *defendant's* right to testify, the major thrust of the *Rock* Court's argument concerned the arbitrary nature of the per se inadmissibility rule, and the fact that this rule unfairly precludes the jury from ever considering testimony which is material to the accused's defense.[164]

For both the defendant *and* the defense witness, this arbitrariness presents several crucial problems. First, in some cases, the hypnotically enhanced testimony could be very reliable, but the application of a per se rule nevertheless precludes the court from ever considering the validity of such testimony.[165] Second, the per se rule does not consider *who* subjects the witness to hypnosis and thus gives the State enormous power to preclude a witness from ever serving as an exculpatory witness for the defense. As Judge Chasanow argued in his dissent, "precluding the defense from calling an exculpatory eyewitness because the State chose to have . . . [the witness] hypnotized" constitutes a denial of the defendant's right to due process.[166]

Although the opinion in *Rock* expressly focused on the defendant's right to present her own testimony to the court,[167] the arbitrary nature of the per se inadmissibility rule has an equal effect on a defendant when it is applied to a defense witness.[168] The Supreme Court has held that a defendant's right to tell his own story necessarily includes testimony by defense witnesses. In *Washington v. Texas*, for example, the Court described the defendant's right to compel witness's testimony as "in plain terms, . . . the right to present a defense, the *right to present the defendant's version of the facts* as well as the prosecution's to the jury so it may decide where the truth lies."[169] Neverthe-

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163. *Id.* at 61. In relevant part, the Court stated that the "[w]holesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections." *Id.*; *see also supra* notes 119-130 (discussing *Rock v. Arkansas*).

164. *See Rock*, 483 U.S. at 55 (noting that a State cannot "apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony"); *see also* Shaw, *supra* note 72, at 63 ("The major thrust of *Rock* is that hypnotically enhanced recall can be made sufficiently reliable that a *per se* exclusion of it is arbitrary.").

165. *See* State v. Iwakiri, 682 P.2d 57 (Idaho 1984) ("[A] *per se* rule of inadmissibility . . . would, in some circumstances, disallow reliable testimony, thus thwarting the truthseeking function of our judicial system.").

166. *See Burral*, 352 Md. at 745, 724 A.2d at 83-84 (Chasanow, J., dissenting).

167. *See Rock*, 483 U.S. at 53; *see also supra* notes 119-130 (discussing *Rock*).

168. *See* Shaw, *supra* note 72, at 63-64 (noting that the Court's reasoning in *Rock* would apply to defense witnesses as well as to defendants because it is based on the Compulsory Process Clause which "is equally applicable to any witnesses testifying on behalf of the defendant" and because "there is nothing unique about a defendant as a witness that makes such use more reliable for the defendant than any other defense witness").

169. 388 U.S. 14, 18 (1967) (emphasis added).

less, the *Burral* Court qualified this component of the *Rock* Court's reasoning by associating it only with the "right of a defendant to testify in his or her own defense,"[170] and refusing to apply the reasoning to other defense witnesses.[171]

The Supreme Court has also expressed the heightened importance of presenting a defense as a whole, which includes both the defendant's right to tell his story, as well as allowing defense witnesses to testify.[172] In *Chambers v. Mississippi*, the Court stated that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense"[173] and that "the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and . . . call witnesses on one's own behalf have long been recognized as essential to due process."[174]

A historical examination of the background of the defendant's right to present witness testimony illustrates that this right, coupled with the defendant's right to testify, is a fundamental right guaranteed under the due process clause.[175] Both rights are premised on the accused's interest in presenting a defense, having either witnesses testify to relevant facts for the defense or having the defendant testify to his version of the story.[176]

The *Burral* court failed to uphold these rights, recognized by the Supreme Court, in order to maintain the application of the *Frye* standard to hypnotically enhanced testimony.[177] The court reflected in detail on the development of the per se rule of inadmissibility for hyp-

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170. *See Burral*, 352 Md. at 82, 724 A.2d at 741; *see also Rock*, 483 U.S. at 58 n.15 (stating that the case did "not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants" and that the Court "express[ed] no opinion on that issue").

171. *Burral*, 352 Md. at 736, 724 A.2d at 79 ("There is no doubt but that *Rock* itself was carefully confined to the testimony of the defendant. That is apparent not only from the footnote added by the Court but from the overall text of the majority opinion."); *see also supra* note 170 and accompanying text (discussing the footnote in which the Supreme Court supposedly limits its holding in *Rock*).

172. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

173. *Id.* (citations omitted).

174. *Id.* at 294.

175. *See* Washington v. Texas, 388 U.S. 14, 18 (1967). Chief Justice Warren, in *Washington v. Texas*, described the right to compel a witness's testimony as one of "the most basic ingredients of due process of law." *Id.*

176. *See supra* notes 173-175 (discussing the Court's historical recognition of the defendant's right to present a defense as derived from defense witness testimony).

177. *See Burral*, 352 Md. at 738, 724 A.2d at 80 ("We have not been asked in this case to abandon *Frye/Reed*, either as a general standard or, other than as a byproduct of extending the Constitutional exception enunciated in *Rock* to all defense witnesses, as the standard applicable to hypnotically-enhanced memory, and we therefore shall not do so.").

notically enhanced testimony, emphasizing the inherent faults that are prevalent in testimony derived from hypnotic recall.[178] The court then concluded that hypnosis was still considered unreliable by a majority of the courts and among the relevant scientific community, and thus, even post-*Rock*, failed to satisfy the *Frye/Reed* standard.[179] However, as Judge Chasanow pointed out in his dissent, the court, in its determination to maintain the per se inadmissibility rule, implied that post-hypnotic recall could never be considered reliable enough to be admissible in evidence.[180] This logic ignores the Supreme Court's statement in *Rock* that "there is no scientific evidence that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her post-hypnotic version for the events for which she is on trial."[181] As Judge Chasanow contends, if it is unconstitutional to exclude per se a defendant's post-hypnotic testimony on grounds of presumed unreliability, then it should be equally unconstitutional to apply the same per se rule of inadmissibility to a defense witness's testimony.[182]

The *Burral* court also emphasized that the Supreme Court's reliance on the Sixth Amendment right to compulsory process in reaching its holding was only one of three sources cited by the Court to justify its holding,[183] and that due to the 'unusual' circumstances of the facts in *Rock*,[184] it would be unsound to extend the compulsory process reasoning to "preclud[e] a State from enforcing neutral and well-founded rules of evidence against defense witnesses in a criminal case."[185]

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178. *See id.* at 739, 724 A.2d at 80 (noting that "'any increase in accurate memories during hypnosis is accompanied by an increase in inaccurate memories,' that 'hypnosis may compromise the subject's ability to distinguish memory from imagination or fantasy,' and that 'when hypnotic . . . techniques are used to interrogate, subjects later report being more certain of the content, even when it is inaccurate.'" (quoting 1 MODERN SCIENTIFIC EVIDENCE § 12-2.2.3 (1997))).

179. *See id.* at 739-40, 724 A.2d at 80.

180. *See id.* at 749, 724 A.2d at 85-86 (Chasanow, J., dissenting).

181. *See id.* (quoting Rock v. Arkansas, 483 U.S. 44, 61 (1987)).

182. *See id.* at 86, 724 A.2d at 749 ("If, as the Supreme Court held in *Rock*, there can be no *per se* rule excluding a defendant's post-hypnotic testimony, then there should be no *per se* rule excluding a defense witness's post-hypnotic testimony.")

183. *See Burral*, 325 Md. at 741, 724 A.2d at 82.

184. The *Burral* court described the 'unusual' circumstances by stating that "the rule barring testimony based on hypnotically-enhanced memory precluded the defendant, herself, who was the only live witness to what had occurred, from presenting a defense, from telling her story." *Id.* at 740, 724 A.2d at 81.

185. *Id.* at 740-41, 724 A.2d at 81.

There are several problems with this general assertion. First, the fact that the right to compulsory process was only one of three bases for the Supreme Court's holding in *Rock* does not detract from the legitimacy of this Constitutional right. The Supreme Court in *Rock* arrived at its conclusion that a defendant has a right to testify even after exposure to hypnosis by analyzing the scope of a defendant's right to call witnesses.[186] The *Rock* Court stated that "a defendant's opportunity to conduct his own defense by calling witnesses [was] incomplete if he [could] not present himself as a witness."[187] When the *Rock* Court recognized and protected the accused's right to present his own version of events through testimony, it was asserted as a component of the defendant's right to compulsory process, and not as a mutually exclusive right.[188] It is illogical to misconstrue the Supreme Court's previously cited words to mean that a *defendant's opportunity to conduct his own defense by calling witnesses is complete if he may present himself as a witness, but not present other witnesses.*[189] In short, the *Burral* court turned the Supreme Court's logic on its head. The Supreme Court in *Rock* began its analysis with the proposition that the right to testify was a fundamental part of the larger right to call witnesses.[190] The *Burral* court concluded, to the contrary, that the larger right to call witnesses generally was satisfied merely if the defendant himself testifies.[191]

b. Plain Language of the Sixth Amendment.—Although the *Burral* court characterized the right to compulsory process as only "a constitutional source of a *defendant's* right to testify,"[192] the Sixth Amendment's express language states that "[i]n all criminal prosecu-

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186. *See Rock*, 483 U.S. at 52 ("A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.").

187. *Id.*

188. *See id.* at 52 ("Logically included in the accused's right to call witnesses whose testimony is 'material and favorable to his defense is a right to testify himself. . . .") (citations omitted).

189. *Burral*, 352 Md at 749-50, 724 A.2d at 86 (Chasanow, J., dissenting) (noting that "the Supreme Court in *Rock* recognized that a defendant's right to testify may be derived from the defendant's constitutional right to call witnesses" and therefore concluding that "there is little justification for saying that the Constitution precludes a state from adopting a *per se* rule barring a defendant's right to offer post-hypnotic testimony but the Constitution does not preclude a state from adopting a *per se* rule barring defense witness's post-hypnotic testimony").

190. *Rock*, 482 U.S. at 52 (recognizing that a defendant's right to compulsory process "by calling witnesses is incomplete if he may not present himself as a witness").

191. *Burral*, 352 Md. at 741, 724 A.2d at 82 (stating that "[t]he *Rock* Court's reference to the right of compulsory process can be given proper effect" without extending its holding regarding the admission of hypnotically-enhanced testimony to defense witnesses).

192. *Id.* at 740, 724 A.2d at 81 (emphasis added).

tions, the accused . . . shall have compulsory process for *obtaining witnesses* in his favor. . . ."[193] Although the Supreme Court applied the compulsory process clause only to a defendant's right to testify in *Rock*, it is illogical to limit the compulsory process clause of the Sixth Amendment to a defendant's right to testify.[194] More telling, there is no express provision in the Constitution granting the defendant the right to testify, while the Sixth Amendment expressly guarantees compulsory process for obtaining witnesses.[195] The purpose and historical meaning of the compulsory process clause have stronger roots in our constitutional history than the *Burral* court would like to admit.[196]

c. Misuse of Hypnosis to Disqualify Witnesses.—Most disturbing is the *Burral* court's dismissal of the possibility that the State could quite easily and unilaterally disqualify defense witnesses by subjecting them to hypnosis.[197] The Court of Appeals has stated in both the *Collins* and *Burral* decisions that while hypnosis is too unreliable to admit as testimony, it is an acceptable tool for police to use as part of their investigations.[198] This fact is striking in light of the fact that the court in *Rock* emphasized an unwillingness to endorse the use of hypnosis as

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193. U.S. CONST. amend. VI (emphasis added); *see also supra* note 2 (stating, in full, the text of the Sixth Amendment).

194. *See Burral*, 352 Md. at 86, 724 A.2d at 749 (Chasanow, J., dissenting) ("There is . . . far more historical and constitutional protection for the defendant's right to call witnesses than for the defendant's right to testify.").

195. *See supra* note 2 and accompanying text (stating in full the text of the Sixth Amendment); *see also Rock*, 484 U.S. at 52. The Court in *Rock* stated:

> The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," . . . . Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," is a right to testify himself, should he decide it is in his favor to do so.

Id. (citations omitted).

196. *See generally* David A. Harris, *The Constitution and Truth Seeking: A New Theory On Expert Services For Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 503 (1992) (arguing that the Sixth Amendment's compulsory process is essential for the courts to be able to fulfill their truth seeking function); *see also* Lisa Graver, Note, *The Current Value Of Compulsory Process: Can A Defendant Compel The Admission Of Favorable Scientific Testimony?*, 48 CASE W. RES. L. REV. 865, 868-74 (1998) (discussing the historical roots and scope of the Sixth Amendment's compulsory process clause).

197. *See Burral*, 352 Md. at 741 n.9, 724 A.2d at 81 n.9 (recognizing the argument that the State may subject known defense witnesses to hypnosis to render their testimony inadmissible, but noting that this did not occur in the present case and therefore the court "need not decide in this case what an appropriate response would be to that situation").

198. *See id.* ("Hypnosis is a valid and accepted technique for use in police investigations."); State v. Collins, 296 Md. 670, 702, 464 A.2d 1028, 1044 (1983) ("We are not satisfied that hypnotically enhanced testimony meets the *Frye-Reed* test. This does not mean that it is impermissible to use hypnosis for investigative purposes.").

an investigative tool without some limitations.[199] The *Burral* court overlooks this important qualification in its analysis.

Additionally, as Judge Chasanow argued in his dissent, the use of improper motives on the State's side could easily bar the witness's hypnotically enhanced testimony when it proved to be unfavorable to the State.[200] Yet, the majority chose not to address the merits of this argument because there was no evidence of malicious intent on the part of the State in *Burral*.[201] The emphasis on malicious intent, however, is misplaced. By the court affirming the use of hypnosis as an investigative tool, the court opens the door to the possibility that defendants will lose potential exculpatory witnesses in the early stages of the case through no fault of their own. Such an occurrence makes it highly unlikely that a defendant will receive a fair trial in accordance with his constitutional right to due process of law.[202]

d. Solutions.—Although hypnosis can produce inaccuracies in an individual's testimony, the Supreme Court in *Rock* expressly recognized that the threat of such inaccuracies could not compel the per se exclusion of the testimony.[203] Instead, the *Rock* Court encouraged the use of procedural safeguards to minimize these potential inaccuracies.[204] For example, the use of a neutral psychologist or psychiatrist with training in forensic hypnosis would minimize the potential unde-

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199. *See* Rock v. Arkansas, 483 U.S. 44, 61 (1987) ("We are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool.").

200. *See Burral*, 352 Md. at 752, 724 A.2d at 87 (Chasanow, J., dissenting). According to Chasanow,

> [t]here is no basis for ruling out the possibility that this State agent was afraid that the witness's initial foggy memory might in time be naturally revived in a way not helpful to the State, and the purpose of the hypnotic session was to assure that it would be revived in a way the State agents desired. If so, the State could omit any mention of the hypnosis, or if they did not like what the hypnotically revived memory revealed, the State could disclose the hypnosis and preclude the witness's post-hypnotic testimony.

Id.

201. *See id.* at 740 n.9., 724 A.2d at 81 n.9 (dismissing Judge Chasanow's concern regarding the ease with which the State could exercise ill motives by stating that there was nothing in the record to suggest that the State acted improperly).

202. *See id.* at 745, 724 A.2d at 83-84 (Chasanow, J., dissenting) ("To apply a per se rule precluding the defense from calling exculpatory witnesses because the State chose to have her hypnotized by a State investigative hypnotist denies the defendant due process of law.")

203. *Rock*, 483 U.S. at 61 ("A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case.").

204. *See id.* (suggesting that hypnosis be performed by a specially trained psychologist/psychiatrist unrelated to the investigation; that the hypnosis be performed in a neutral setting; that all interrogations are taped or recorded on video; that witnesses are cross-examined for inconsistencies; that the jury be educated on the strengths and weaknesses of hypnosis; and that corroborating evidence be used).

sirable effects on the testimony.[205] Additionally, using a neutral figure in conducting the hypnosis sessions would serve to mitigate the effect of the free reign that the State presently has in eliminating potential defense witnesses by exposing them to hypnosis.[206] Also, the use of corroborating evidence can reduce the risks associated with hypnotically enhanced testimony.[207] Applying a per se rule of inadmissibility when other evidence demonstrates the accuracy of the testimony highlights the complete arbitrariness of the per se rule. To apply arbitrary evidentiary rules for the supposed purpose of supporting a State's interest in maintaining uniform rules disregards the essential truth-seeking function of the courts.[208]

5. Conclusion.—The court's decision in *Burral v. State* denies the defendant his Sixth Amendment right to compulsory process and Fourteenth Amendment right to due process of law. While the use of hypnotically enhanced testimony presents problems of unreliability, the Supreme Court has previously held that at least with respect to a defendant's right to testify, such problems cannot supersede the defendant's fundamental right to present a defense. This reasoning logically extends to barring the application of a per se rule of inadmissibility to the testimony of defense witnesses who have been exposed to hypnosis. The *Burral* court's disregard for such fundamental rights ultimately compromises the truth-seeking function of the courts.

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205. *See id.* at 60 ("One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist." (citation omitted)).

206. *See supra* notes 200-201 (addressing Judge Chasanow's concern that the majority's decision in *Burral* gives the State unlimited power to expose potential defense witnesses to hypnosis during the investigation stage and thus, eliminate the use of their testimony by the defense).

207. *See Rock*, 483 U.S. at 61 ("Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence.").

208. *See supra* notes 112-113 (discussing the point made in *State v. Iwakiri*, 682 P.2d 571 (Idaho 1984), that the exclusion of reliable testimony thwarts the truth-seeking function of the courts).

X. FAMILY LAW

A. *Narrowing the Scope of the Best Interests of the Child Standard*

In *Giffin v. Crane*,[1] the Court of Appeals considered whether, in a child custody proceeding, the court is permitted to consider the sex of either parent as a factor in determining which parent is the appropriate residential custodian.[2] The court held that the Maryland Equal Rights Amendment[3] prohibited an award of custody to a mother based on a finding that she would be a better custodian because a female child of a certain age had a specific psychological need to be with her same-sex parent.[4] Through the court's misinterpretation of the facts of the case, and an overzealous application of Equal Rights Amendment jurisprudence, the court inadvertently restricted the scope of the best interests of the child standard[5] by prohibiting the consideration of any special relationship that exists between a same-sex parent and a child. Consequently, the court's decision is inconsistent with the primary purpose of child custody proceedings—to promote the child's best interest.[6]

1. The Case.—James M. Giffin (Giffin), and Donna L. Crane (Crane), separated in 1992 after twelve years of marriage.[7] They have two daughters, Emily Stoughton, born December 22, 1982, and Sarah Ellen, born June 26, 1988.[8] After filing for divorce, the parties mutually entered into a written agreement, settling the issues of custody and visitation, which were incorporated in the divorce decree.[9] The

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1. 351 Md. 133, 716 A.2d 1029 (1997).

2. *Id.* at 143, 716 A.2d at 1034.

3. MD. CONST. art. 46. Article 46 states that "[e]quality of rights under the law shall not be abridged or denied because of sex." *Id.*

4. *See Giffin*, 351 Md. at 155, 716 A.2d at 1040.

5. *See* discussion *infra* Part 3.a (discussing the best interests of the child standard).

6. *See Giffin*, 351 Md. at 145, 716 A.2d at 1035 (recognizing that in a custody case "the [trial] court's exercise of discretion must be guided, first and foremost, by what it believes would promote the child's best interest, which, in custody disputes, is in transcendent importance").

7. *See id.* at 135, 716 A.2d at 1030.

8. *See id.* During the separation, the children remained in the marital home with their father. *See id.* The mother lived close by and maintained regular visitation for one year, at which time she moved to Kentucky. *See id.* Both parties filed for divorce in the Circuit Court of Montgomery County on the ground of voluntary separation in excess of one year. *See id.* In addition, both parties sought custody of the children, child support, and attorney's fees. *See id.*

9. *See id.* at 135-36, 716 A.2d at 1030-31. The relevant provisions of the custody decree stated:

> 1.1 The Husband shall have sole physical custody of the minor children, and the parties shall share their joint legal custody. The parties will attempt to agree on a mutually acceptable visitation schedule consistent with the activities and

agreement provided for both Giffin and Crane to have joint legal custody, while Giffin would retain sole physical custody of both children.[10]

The agreement also included a provision providing that a mutually agreeable mental health professional may review the residential status of the children, at the expense of the requesting party.[11] Such a review was conducted at the request of Crane.[12] After conducting a review of the status of the children, the mental health professional recommended that physical custody of the children be changed from Giffin to Crane.[13] As a result of Giffin's failure to accept this

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schedules of the children, but if they cannot agree, the Wife's access to the children shall be according to the schedule provided in paragraph 1.5 . . . .

1.3 Neither party shall unilaterally make any substantial decisions affecting the welfare of the children or enter into any contracts regarding such decisions without prior consultation with the other party . . . .

Id. at 135 n.1, 716 A.2d at 1031 n.1 (internal quotation marks omitted) (citation omitted).

10. *See id.* at 136, 716 A.2d at 1031.

11. *See id.* Section 1.4 of the divorce/custody agreement provides:

Either party shall have the right at his or her expense after contribution by all available insurance to request a comprehensive review of the residential status of the children by Dr. Mary Donahue or another mental health professional agreed by the parties. The purpose of this review will be determined by Dr. Donahue's using professional standards and her discretion. It is anticipated by the husband that as part of this review Dr. Donahue will consult with teachers and others who have knowledge of the children and their needs. The parties agree that Dr. Donahue will meet with the children within 30 days after the signing of this agreement so as to have a basis of information and that she may make inquiry of the court appointed attorney or others as she sees fit. The parties shall divide the uninsured costs of the first meetings within 30 days.

The wife desires that Dr. Donahue conduct a review of the children's residential status in 1995. The parties agree that thereafter each will be entitled to request such a review on not more than an annual basis; the parent requesting the review shall be responsible for the payment therefor.

Id. at 136-37, 716 A.2d at 1031 (internal quotation marks omitted) (citation omitted).

12. *See id.* at 137, 716 A.2d at 1031.

13. *See id.* Subsequent to her 1995 review, Dr. Donahue stated in a letter, dated August 16, 1995, to the parties and their counsel as follows:

Dear Parties:

At the request of Ms. Valtri, I am clarifying what I believe is in Emily Giffin's best interests based on two individual sessions with her and one joint session with her father.

By way of background, I first met Emily in April of 1994. At that time, she expressed both comfort and satisfaction with the living arrangements in place for her. Basically, she spent the academic year with her father in Maryland and the majority of the summer in Kentucky with her mother.

In the course of the 94-95 school year, Emily began to experience the need to have more time with her mother. This was somewhat compounded by her school situation. In the fall of 1994, she moved from elementary school to middle school. The behavior of a sizable percentage of the student body in this school

recommendation, Crane filed a petition for modification of child custody.[14]

During the hearing on Crane's petition, the trial court heard testimony from more than twenty witnesses and numerous exhibits were received, including private investigators' reports.[15] The trial court decided to grant Crane's petition and ordered that the custody of the children be transferred to Crane.[16] In so deciding, the court explained:

> [t]here is no question . . . in this case that both parents are caring parents, loving parents. There is no doubt by looking at the record that the father, with whom the children have resided this past period of time, is a parent who can attend to all of their physical needs relevant to growing up in a healthy physical situation.[17]

The trial court, however, placed great weight on the testimony of the older daughter, Emily, who explained that she was better able to com-

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has resulted in Emily's feeling somewhat overwhelmed and vulnerable. Her school life was therefore less satisfactory than it had been in the past.

However, the overriding need I discerned in Emily was the opportunity to know her mother better. Ms. Valtri's work and living situation have changed dramatically since she relocated to Kentucky. From having a job when married to Mr. Giffin which required many hours at work and travel away from home, she now finds herself able to be at home as a full time mother. Emily, developmentally an early adolescent, appears to need to be provided with an opportunity to bond with her mother in a way that was unavailable in the past.

It is not that her father has failed her is some way as a parent. It is rather that she has an emotional need to be with her mother which was not previously the case. Psycho-dynamically, if Emily perceives that it is her father that has prevented her from finding out the true nature of her relationship with her mother, it is not unlikely that over time, she will come to resent him, should this occur, the positive nature of her current relationship with her father will most likely be damaged.

Mr. Giffen [sic] has raised with me the advisability of Ms. Valtri's relocating back to the Maryland area given that she is no longer employed and her husband's employment is primarily located in Maryland. It is usually preferable for any children of divorce to have their parents living in a reasonable proximity to one another. Such would be the case for this family. However, regardless of where Ms. Valtri resides, I believe Emily needs the opportunity to reside with [the respondent] during this coming academic year and her father the following summer. There are no guarantees. This arrangement may work for Emily and it may not work for her. It remains to be seen. Should it not work, it should be understood that she can return to her present schedule.

Id. at 136 n.2, 716 A.2d at 1031 n.2 (internal quotation marks omitted) (citation omitted).

14. *See id.* at 138, 716 A.2d at 1032. Crane also requested a modification of child support. *See id.*

15. *See id.* at 139, 716 A.2d at 1032.

16. *See id.*

17. *Id.* at 139-40, 716 A.2d at 1032-33.

municate with her mother.[18] This testimony led the trial court to conclude that:

> the best interests of the children and the material change of circumstances, as exemplified by the reaching an age where Emily at the very least exemplifies a need for a female hand, causes the Court to come to the conclusion that the children should reside with their mother.[19]

Giffin appealed the custody modification to the Court of Special Appeals, arguing that the trial court had erred in considering the gender of the parents as a factor in its determination of custody.[20] The Court of Special Appeals disagreed with Giffin, and in an unreported opinion, held that gender was a permissible factor to be considered in this residential custody case.[21] The Court of Appeals granted certiorari to resolve whether parental gender is an appropriate factor to be considered in a residential custody case.[22]

2. Legal Background.—

a. Best Interests of the Child.—Under early English common law, a father had an absolute right to the custody of his children, regardless of any consideration as to their welfare.[23] As early as 1878, however, the Court of Appeals of Maryland recognized the best interests of the child to be the paramount consideration in a child custody dispute.[24] Despite the court's acknowledgment of the need to determine the child's best interest, in early decisions, the courts continued to recognize that the father had a special interest in the custody of his minor children.[25] This interest was recognized because of the father's

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18. *See id.* at 140, 716 A.2d at 1033.

19. *Id.* at 140-41, 716 A.2d at 1033. The trial court also stated that "a girl child having particular need for her mother" was "a necessary factor" in its decision. *Id.* at 140, 716 A.2d at 1033.

20. *See id.* at 141, 716 A.2d at 1033.

21. *See id.*

22. *See id.* at 143, 716 A.2d at 1034.

23. *See* McAndrew v. McAndrew, 39 Md. App. 1, 4, 382 A.2d 1081, 1083 (1978).

24. *See* Hill v. Hill, 49 Md. 450, 458 (1878) (stating that "the welfare of the child is certainly the primary objective to be obtained"); *see also* Note, *Best Interests of the Child: Maryland Child Custody Disputes*, 37 MD. L. REV. 641, 641 n.2 (1978) [hereinafter *Child Custody Disputes*] ("The Maryland Court of Appeals recognized the child's interests as the paramount concern as least as early as 1878." (discussing *Hill*, 49 Md. at 458)).

25. *See, e.g.*, Montgomery County Dep't of Soc. Servs. v. Sanders, 38 Md. App. 406, 414-15, 381 A.2d 1154, 1160-61 (1978) (acknowledging the common law entitlement of the father to his offspring); *Child Custody Disputes*, *supra* note 24, at 641 n.2; *see also* Carter v. Carter, 156 Md. 500, 505, 144 A. 490, 492 (1929) (recognizing that in the case of divorce or of separation, where a custody dispute arises, "the right of the father is ordinarily superior to that of the mother").

traditional responsibility for the financial support and discipline of his children.[26] Even under the common law approach, where the children were basically viewed as chattel of the father,[27] the courts maintained a right to intervene when necessary for the protection of the child.[28]

In 1929, fathers definitively lost their absolute right to custody of their children in Maryland when the Maryland Legislature enacted article 72A, section 1, which provides, in pertinent part:

> The father and mother are the joint natural guardians of their minor child and are equally charged with its care, nurture, welfare and education. They shall have equal powers and duties, and neither parent has any right superior to the right of the other concerning the child's custody.[29]

Despite the clear language of the statute, the Court of Appeals continued to refer, in several cases, to a father's "natural right" to custody.[30]

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26. *See Carter*, 156 Md. at 505, 144 A. at 492 ("[T]he primary right to custody of the children is in the father, since it is his duty to provide for his children's protection, maintenance, and education."); Boggs v. Boggs, 138 Md. 422, 429, 114 A. 474, 477 (1921) (recognizing that the primary liability for support of a child at common law is imposed on the father); *McAndrew*, 39 Md. App. at 4, 382 A.2d at 1083 (discussing the father's "preeminent right" to custody under common law based on the father's responsibility for support and discipline of his minor children); *Sanders*, 38 Md. App. at 414-15, 381 A.2d at 1160-61 (discussing the colonial courts' fusion of the father's right to custody with his duty to support his children); *see also Child Custody Disputes*, *supra* note 24, at 641 n.2 (discussing the "*patria potestas* doctrine—the right of the father to the custody and services of his children").

27. *See* John W. Ester, *Maryland Custody Law—Fully Committed To The Child's Best Interests?*, 41 MD. L. REV. 225, 228 (1982) (stating that, under the common law rule, "[s]ince the welfare of the child was irrelevant, the courts might more accurately have spoken of the father's absolute right to possession of a thing, rather than custody of a child").

28. *See McAndrew*, 39 Md. App. at 4, 382 A.2d at 1083 (acknowledging colonial courts' reservation of a right to interfere with a father's right to custody of his children if he failed to care for them properly); *Sanders*, 38 Md. App. at 414-15, 381 A.2d at 1160-61 (discussing the government's authority to appoint a guardian for a child if the child's father failed to execute his duties).

29. Act of April 11, 1929, ch. 561, 1929 Md. Laws 1361, § 1.

30. *See* Sibley v. Sibley, 187 Md. 358, 362, 50 A.2d 128, 130 (1946) (articulating that while "the natural right to custody of children is in the father, the courts in this state are primarily concerned in all custody cases with the welfare of the infant"); Piotrowski v. State, 179 Md. 377, 381, 18 A.2d 199, 200 (1941) (discussing the argument put forth by the appellee that "the natural right to custody of children is in the father" and stating "there are numerous decisions in this state to sustain that view"); *see also Child Custody Disputes*, *supra* note 24, at 642 n.2 (stating that "[a]lthough the clear import of the statute was that the father's custody rights were not to be deemed superior to those of the mother, the Court of Appeals continued in several cases to speak of the father's 'natural right' to the custody of his children").

The Court of Appeals finally recognized the abolishment of the paternal preference doctrine in 1943.[31] Children were no longer viewed as property, and the courts began to exercise their equity powers[32] "with the paramount purpose in view of securing the welfare and promoting the best interest of the children."[33] In leaving behind the common law paternal preference doctrine, the Maryland court began to develop the notion that the best interests of the child would best be served by granting custody to the mother.[34] This notion, commonly known as the maternal preference doctrine

> is simply a recognition by the law, as well as by the commonality of man, of the universal verity that the maternal tie is so primordial that it should not lightly be severed or attenuated. The appreciation of this visceral bond between mother

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31. *See* Dunnigan v. Dunnigan, 182 Md. 47, 52-53, 31 A.2d 634, 636-37 (1943) (recognizing implicitly that the paternal preference doctrine had been legislatively eliminated); *see also Child Custody Disputes*, *supra* note 24, at 642 n.2 (same).

32. Maryland courts of equity were granted jurisdiction over child custody proceedings by statute. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-602 (Supp. 1977). The broad statute reads in part:

> (a) *Jurisdiction of courts of equity.*— A court of equity has jurisdiction over the custody, guardianship, legitimization, maintenance, visitation and support of a child. In exercising its jurisdiction, the court may:
>
> (1) Direct who shall have the custody or guardianship of a child;
>
> (2) Determine the legitimacy of a child. . . .
>
> (3) Decide who shall be charged with the support and maintenance of a child, pendente lite or permanently;
>
> (4) Determine who shall have visitation rights to a child; or
>
> (5) From time to time set aside or modify its decree or order concerning the child.

Id. § 3-602(a).

33. Ross v. Hoffman, 280 Md. 172, 175, 372 A.2d 582, 585 (1977) (quoting Burns v. Bines, 189 Md. 157, 162, 55 A.2d 487 (1947) (quoting in turn Bainard v. Godfrey, 157 Md. 264, 267, 145 A. 614 (1929))); *see also* Elza v. Elza, 300 Md. 51, 56, 475 A.2d 1180, 1183 (1984) (explaining that the best interests of the child are of "transcendent importance" (quoting Nagle v. Hooks, 296 Md. 123, 128, 460 A.2d 49 (1983); Ross v. Hoffman, 280 Md. 172, 175, 372 A.2d 582, 585 (1977))); Butler v. Perry, 210 Md. 332, 342, 123 A.2d 453, 458 (1956) (explaining that the welfare of the child is the "controlling test"); Young v. Weaver, 185 Md. 328, 331, 44 A.2d 748, 749 (1945) (calling the child's best interests the "sole question"); *Piotrowski*, 179 Md. at 381, 18 A.2d at 201 (characterizing the best interests of the child as the "paramount consideration").

34. *See* McAndrew v. McAndrew, 39 Md. App. 1, 4, 382 A.2d 1081, 1085 (1978) (recognizing that after abandoning the paternal preference doctrine, Maryland adopted the maternal preference doctrine, which suggested that "the interests of young children, particularly females, ordinarily [are] best served when they are placed in the custody of their mother"); *see also* Ester, *supra* note 27, at 229 (stating that "when the paternal preference rule began to disappear, the Court of Appeals was developing a 'maternal preference' doctrine" (citation omitted)).

> and child will always be placed upon the balance scales and, all else being equal or nearly so, will tilt them.[35]

In *McAndrew v. McAndrew*,[36] however, the Court of Special Appeals determined that the maternal preference doctrine had been abolished by the 1974 amendment to article 72A, section 1 of the Maryland Code,[37] which explicitly states that "in any custody proceeding, neither parent shall be given preference solely because of his or her sex."[38] The court reasoned that at the time this amendment was passed, the only parental preference doctrine in existence was the ma-

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35. Kirstukas v. Kirstukas, 14 Md. App. 190, 196, 286 A.2d 535, 538 (1972); *see also* Ester, *supra* note 27, at 229-33 (discussing the maternal preference doctrine).

36. 39 Md. App. 1, 382 A.2d 1081 (1978).

37. *See id.* at 8, 382 A.2d at 1086 ("[W]e conclude that . . . the maternal preference doctrine has been abolished by statute in child custody cases.").

38. Act of April 9, 1974, ch. 181, 1974 Md. Laws 806 (codified as amended at MD. ANN. CODE art. 72, § 1 (1978)). As originally enacted by ch. 561 of the 1929 Laws of Maryland, Article 72A, "Parent and Child," stated that

> [t]he father and mother are the joint natural guardians of their minor child and are equally charged with its care, nurture, welfare and education. They shall have equal powers and duties, and neither parent has any right superior to the right of the other concerning the child's custody . . . . Where the parents live apart, the court may award the guardianship of the child to either of them.

Act of April 11, 1929, ch. 561, 1929 Md. Laws 1361, § 1 (codified as MD. ANN. CODE art. 72A, § 1 (Supp. 1929)). In 1974, article 72A was amended to read "Where the parents live apart, the court may award the guardianship of the child to either of them[.] BUT, IN ANY CUSTODY PROCEEDING, NEITHER PARENT SHALL BE GIVEN PREFERENCE SOLELY BECAUSE OF HIS OR HER SEX." 1974 Md. Laws at 806. Article 72A, was superseded by the Family Law Article, § 5-203 of the 1984 Maryland Code, which states:

> Natural guardianship; powers and duties of parents; award of custody to parent
>
> (a) Natural guardianship.—
>
> (1) The parents are the joint natural guardians of their minor child.
>
> (2) A parent is the sole natural guardian of the minor child if the other parent:
>
> (i) dies;
>
> (ii) abandons the family; or
>
> (iii) is incapable of acting as a parent.
>
> (b) Powers and duties of parents.—The parents of a minor child:
>
> (1) are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and
>
> (2) have the same powers and duties in relation to the child.
>
> (c) If one or both parents of a minor child is an unemancipated minor, the parents of that minor are jointly and severally responsible for any child support for a grandchild that is a recipient of temporary cash assistance to the extent that the minor parent has insufficient financial resources to fulfill the child support responsibility of the minor parent.
>
> (d) Award of custody to parent.—
>
> (1) If the parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents.
>
> (2) Neither parent is presumed to have any right to custody that is superior to the right of the other parent.

ternal preference doctrine.[39] Therefore, it was the maternal preference that the General Assembly intended to abolish.[40] The court noted, however, that the abolishment of the maternal preference doctrine was not meant to infer that in determining the best interests of the child, the court might not consider "the biological and psychological differences between the parents . . . to the extent that they bear upon their ability to provide the care needed by the child at the time."[41]

Six years later, in *Elza v. Elza*,[42] the Court of Appeals affirmed the Court of Special Appeals's abolition of the maternal preference doctrine in custody cases.[43] Finding the reasoning of the Court of Special Appeals in *McAndrew* persuasive, the Court of Appeals upheld the abolition of the maternal preference doctrine because it permitted custody to be awarded to the mother "solely on the basis of . . . sex."[44] Instead, the court concluded that determining a child's best interests requires an examination of the "biological and psychological differences between the parents, the needs of the particular child, and the relationship of each parent to the child . . . ."[45]

At present, the best interests of the child standard is deemed to be controlling in Maryland law.[46] In resolving a custody dispute, there is one and only one applicable standard for the court to apply "'[t]he best interest of the child.' . . . The development and application of this standard shows that the standard itself is one of the 'Eternal Truths' of family law."[47]

MD. CODE ANN., FAM. LAW § 5-203 (1984). The wording of the 1974 amendment to article 72A was not included in § 5-203 because it was "deemed unnecessary in light of the Maryland Equal Rights Amendment." *Giffin*, 351 Md. at 142 n.5, 716 A.2d at 1034 n.5.

39. *See McAndrew*, 38 Md. App. at 8, 382 A.2d at 1086 (recognizing that in 1974 when article 72A, § 1 was amended, "[t]here was no preference of either spouse in a custody proceeding, based on sex, other than the maternal preference").

40. *See id.* (stating that it was the "maternal preference, being the only sex based preference when established in law, that the General Assembly intended to abolish").

41. *Id.* at 8-9, 382 A.2d at 1086.

42. 300 Md. 51, 475 A.2d 1180 (1984).

43. *See id.* at 59, 475 A.2d at 1184 (holding that the maternal preference doctrine was legislatively abolished in Maryland).

44. *Id.*

45. *Id.*

46. *See, e.g.*, Giffin v. Crane, 351 Md. 133, 145, 716 A.2d 1029, 1035 (1997) (recognizing that the courts "must be guided first and foremost by what it believes would promote the child's best interest"); Elza v. Elza, 300 Md. 51, 56, 475 A.2d 1180, 1183 (1984) (stating that "[t]his Court has stated numerous times, . . . [that] the chancellor must be guided by what he believes would promote the child's best interests").

47. JOHN F. FADER II, DOMESTIC RELATIONS LAW 1, ch.3, at 8 (1996).

b. Maryland's Equal Rights Amendment.—Article 46 of the Declaration of Rights of the Maryland Constitution provides that, "[e]quality of rights under the law shall not be abridged or denied because of sex."[48] The Court of Appeals has considered the scope of the ERA in a number of cases.

In *State Board of Barber Examiners v. Kuhn*,[49] the court considered whether a statute that prohibited cosmetologists from rendering services to male patrons, which they could lawfully render to female patrons, violated the ERA.[50] The court concluded that the statute did not constitute discrimination based on sex under the ERA because the statute applied to male as well as to female cosmetologists and barbers.[51]

In 1977, the Court of Appeals again examined the ERA in *Rand v. Rand*.[52] *Rand* involved a constitutional challenge to the continued application of the common law rule that a father is primarily liable for the financial support of his children.[53] In a unanimous decision, the court determined that the adoption of the ERA in Maryland was "intended to, and did, drastically alter traditional views of the validity of sex-based classifications."[54] The *Rand* court further determined that the language of the ERA could "only mean that [under the law] sex is not a factor."[55] Thus, the court held that "the mandate of the ERA" required that "the parental obligation for child support . . . [be] shared by both parents."[56]

In arriving at its decision, the *Rand* court examined a wide array of state interpretations of their respective ERAs, which ranged from

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48. MD. CODE ANN., CONST. art. 46 (1981). Article 46, also known as the Equal Rights Amendment (ERA), was adopted in 1972 upon direct popular vote. *See* Awilda R. Marquez, Comment, *Comparable Worth and the Maryland ERA*, 47 MD. L. REV. 1129, 1162 (1988).

49. 270 Md. 496, 312 A.2d 216 (1973).

50. *See id.* at 498, 312 A.2d at 217-18. The statute in question restricted cosmetologists, generally women, to shampooing and cutting women's hair, while barbers, usually men, were authorized to cut both women's and men's hair. *See id.* at 498-99, 312 A.2d at 218.

51. *See id.* at 505-07, 312 A.2d at 221-22 (discussing and adopting the appellant's position that "this is not a case of sex discrimination because . . . the statute does not discriminate against cosmetologists of either sex; nor . . . is there discrimination based on sex between barbers").

52. 280 Md. 508, 374 A.2d 900 (1977).

53. *See id.* at 511, 374 A.2d at 902. Although earlier decisions allowed a court to take a mother's earnings into account, this was the first time that the Court of Appeals considered whether the ERA *required* that a court do so. *See id.* at 511, 374 A.2d at 902 (citing Groner v. Davis, 260 Md. 471, 272 A.2d 621 (1971); Melson v. Melson, 151 Md. 196, 134 A. 136 (1926)).

54. *Id.* at 515-16, 374 A.2d at 905.

55. *Id.* at 512, 374 A.2d at 903.

56. *Id.* at 516, 374 A.2d at 905.

permissive to absolute.[57] In choosing to adopt an absolute standard of review for Maryland's ERA, the court emphasized its determination that sex-based classifications were strictly prohibited.[58]

Following *Rand*, the Court of Appeals had several occasions to apply the absolute standard of review to cases involving gender discrimination.[59] In these cases, sex-based classifications were continually struck down as violative of the ERA.[60] It was not until 1985, in the case of *Burning Tree Club, Inc. v. Bainum*,[61] that the court began to stray from the application of an absolute standard of review in cases involving Maryland's ERA.[62]

In *Burning Tree*, the court considered whether a facially neutral statute,[63] which granted tax deferrals to private country clubs in return for guarantees that open spaces on club property would be preserved, violated the ERA.[64] The statute at issue, enacted in 1965, authorized the State Department of Assessment and Taxation to grant private country clubs a property tax deferral in exchange for a ten-year commitment to preserve its open spaces by not developing or selling its land.[65] In 1974, the General Assembly amended the statute to include an antidiscrimination provision, but exempted application of that provision to any club whose "primary purpose" was to serve or

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57. *See id.* at 512-16, 374 A.2d at 902-05. At the time of the *Rand* decision, Illinois, Texas, and Louisiana had adopted a permissive test for sex-based classifications under their respective ERAs, which allowed for the continuation of a sexually discriminatory practice if it could be justified by a compelling state interest. *See id.* at 514-15, 374 A.2d at 904 (citing Illinois v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974); Louisiana v. Barton, 315 So. 2d 289 (La. 1975); Mercer v. Board of Trustees, 538 S.W.2d 201 (Tex. Civ. App. 1976)). On the other hand, Washington, Pennsylvania, and Colorado had adopted an absolute test for sex-based classifications, which does not permit gender discrimination for any reason. *See id.* at 512-13, 374 A.2d at 903 (citing Colorado v. Salinas, 551 P.2d 703, 706 (Colo. 1976); Darrin v. Gould, 540 P.2d 882 (Wash. 1975); Henderson v. Henderson, 327 A.2d 60, 62 (Penn. 1974)).

58. *Id.* at 515-16, 374 A.2d at 904-05 ("Like the Supreme Court of Washington . . . we believe that the 'broad, sweeping, and mandatory language' of the [Equal Rights] amendment is cogent evidence that the people of Maryland are fully committed to equal rights for men and women." (citation omitted)).

59. *See* Marquez, *supra* note 48, at 1167 and cases cited therein (discussing cases in which the Court of Appeals applied the absolute standard of ERA review).

60. *See id.* (discussing cases in which the Court of Appeals struck down sex-based classifications, applying the absolute standard of review).

61. 305 Md. 53, 501 A.2d 817 (1985).

62. *See* Marquez, *supra* note 48, at 1168-74 (discussing the *Burning Tree* court's "split into two factions on its interpretation of the Maryland ERA[,]" as it circumvented the application of the absolute standard against sex-based classifications set forth in *Rand*).

63. *Burning Tree* was the first case to explore the application of Maryland's ERA to a facially neutral law or state action. *See id.* at 1167-68.

64. *Burning Tree*, 305 Md. at 56, 501 A.2d at 818.

65. *See id.* at 56-57, 501 A.2d at 818-19.

benefit members of a particular sex.[66] As a result, Burning Tree Club, a private golf club, was permitted the tax deferral, while barring women from membership.[67]

Although the court unanimously agreed that the "primary purpose" provision of the 1974 amendment violated the Maryland ERA, a majority could not agree on the correct standard to apply to facially neutral laws under the ERA. The faction led by Chief Judge Murphy suggested that the absolute standard set forth in *Rand* would apply only if the challenged law imposed a burden or benefit on one sex, but not on the other.[68] Thus, protection under the ERA would only be triggered if the law in question absolutely forbade the determination of rights based solely on gender; such protection would not come into play if both sexes theoretically had equal protection under the law.[69]

The other faction, led by Judge Eldridge, argued that even when a statute does not draw gender-based classifications on its face, it is appropriate to scrutinize the actual facts to determine if there exists a discriminatory purpose or impact.[70] If gender discrimination is found to be present, Judge Eldridge would apply an "at least strict scrutiny standard."[71] Under this standard of review, gender-based classifica-

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66. *See id.* at 57-58, 501 A.2d at 819.

67. *See id.* at 58-59, 501 A.2d at 819-20.

68. *See id.* at 70-71, 501 A.2d at 825-26 (noting that governmental actions are invalid under the ERA when they "impose[ ] a burden on one sex, but not the other, or grant a benefit to one but not the other").

69. *See id.* at 70, 501 A.2d at 825 (discussing how the statute in question did not violate the ERA because in theory all clubs, "whether comprised of all men, all women, or of mixed membership" had access to the tax benefit). Chief Judge Murphy argued that the statute at issue in *Burning Tree* did not constitute a "denial or abridgment of equal rights under the law as between men and women" because the tax benefit granted by the statute was available to *all* single sex clubs that met the statutory requirements. *Id.* at 70-71, 501 A.2d at 825-26.

70. *See id.* at 100, 501 A.2d at 841 (Eldridge, J., concurring in part and dissenting in part). Judge Eldridge argued that the statute in *Burning Tree* did not provide equal protection to men and to women because the "sole purpose of the [statute] was to allow Burning Tree to continue discrimination against women and still receive the state subsidy." *Id.* at 100, 501 A.2d at 840. Judge Eldridge reached this conclusion because at the time the statute at issue was passed, Burning Tree was "the only entity to which the [statute] was applicable." *Id.*

71. *Id.* at 98, 501 A.2d at 840 (stating that "the ERA renders sex-based *classifications* suspect and subject to at least strict scrutiny," but noting that "because of the inherent differences between the sexes, some sex-based classifications may be justified after such scrutiny").

tions are not always prohibited; such classifications may be justified if a compelling state interest is demonstrated.[72]

Although the court has had several opportunities to decide both custody cases and ERA cases, *Giffin v. Crane* was the court's first opportunity to apply directly ERA jurisprudence to a case involving consideration of gender as a factor in determining the residential custody of a child.[73]

3. The Court's Reasoning.—In *Giffin v. Crane*, the Court of Appeals held that in determining the best interests of a child in a custody proceeding, it is improper to consider a particular child's need to be with her same-sex parent because such a consideration constitutes a violation of the ERA.[74] In reaching this conclusion, Chief Judge Bell, writing for the majority, began by reiterating the well-established "best interests" standard, explaining that in determining which parent should be awarded custody of a minor child, "[t]he court's exercise of discretion must be guided first, and foremost, by what it believes would promote the child's best interest . . . ."[75] Against this backdrop, the court turned to a discussion of Maryland's ERA.[76] The court noted that the mandate of the ERA generally prohibits the consideration of sex in determining legal rights of any person through the grant of a benefit to or an imposition of a burden on one sex but not on the other.[77]

The petitioner argued that "the sex of the parent is not a legitimate consideration in child custody cases."[78] Conversely, the respondent argued that precedent does not forbid the consideration of sex, so long as the court is examining the biological and psychological differences between parents.[79]

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72. *See id.* at 96, 501 A.2d at 839 (stating that "classifications based on sex are suspect, that they are subject to at least strict scrutiny, and that the burden is upon those attempting to justify such classifications to demonstrate a compelling state interest").

73. *See Giffin*, 351 Md. at 151, 716 A.2d at 1038. In *Elza v. Elza*, 300 Md. 51, 475 A.2d 1180 (1984), while deciding a custody case, the Court of Appeals noted that the provision that was before the court was the same provision that was at issue in *Rand*; however, neither party raised an ERA claim, and thus, the court could not rule on the impact of the ERA on custody. *See id.* at 54 n.1, 475 A.2d 1181 n.1.

74. *Giffin*, 351 Md. at 155; 716 A.2d at 1040.

75. *Id.* at 145, 716 A.2d at 1035 (citing *Elza*, 300 Md. at 60, 475 A.2d at 1183; Kemp v. Kemp, 287 Md. 165, 170, 411 A.2d 1028, 1031 (1980); Stancill v. Stancill, 286 Md. 530, 534, 408 A.2d 1030, 1033 (1979); Ross v. Hoffman, 280 Md. 172, 174-75, 372 A.2d 582, 585 (1977); Krebs v. Krebs, 255 Md. 264, 266, 257 A.2d 428, 429 (1969)).

76. *See id.* at 146, 716 A.2d at 1035-36.

77. *See id.* at 148-49, 716 A.2d at 1037.

78. *Id.* at 141, 716 A.2d at 1033.

79. *See id.* at 141-42, 716 A.2d at 1033-34 (citing *Elza*, 300 Md. 51, 475 A.2d 1180).

The court accepted the petitioner's argument, and in so doing, placed child custody disputes within the sphere protected by the ERA.[80] In so holding, the Court of Appeals determined that it was unambiguously clear that the trial court had relied upon impermissible considerations of gender in arriving at its decision.[81]

Next, as a threshold matter, the majority considered whether the trial court used gender as a determining factor in its custody decision, and determined that it had, in fact, done so.[82] Despite the fact that the trial court's decision focused on Emily's testimony that she could "more easily communicate with her mother,"[83] the Court of Appeals concluded that no specific evidence of a communication problem between Emily and her father had been presented.[84] While the court recognized that the ability of a child to communicate better with one parent than the other may be a reason to modify a custody agreement, the court felt as though the trial court had, instead, based its decision on the testimony of one of the experts who testified that a girl child has a particular need for her mother and a female hand.[85] To support its position, the Court of Appeals pointed to the language in the trial court's opinion in which the trial court recognized that both parents were loving and caring parents and that the father had done an exceptional job raising the children up to this point, but finding that Emily "had reached an age where [she] at the very least exemplifies a need for female hand."[86]

The Court of Appeals therefore concluded that the trial court's decision "could not have been the product of testimony about the par-

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80. *See id.* at 147-48, 716 A.2d at 1036-37 (taking note of the petitioner's argument that "the chancellor did not conduct an individualized examination of the evidence . . . . He merely said a girl needs her mother").

81. *See id.* at 147, 716 A.2d at 1036 (stating that "when one considers the trial court's explanation of its decision, it is clear, unambiguously, that the court was relying on the respondent's gender as the decisive basis for modifying the custody order").

82. *See id.* at 146-47, 716 A.2d at 1036 ("When one considered the trial court's explanation of its decision, it is clear that the [trial] court was relying on . . . gender as the decisive basis for modifying the custody order.").

83. *See id.* at 146, 716 A.2d at 1036.

84. *See id.* at 147, 716 A.2d at 1036 ("[A]s the [trial] court itself acknowledged, there was no specific or particularized testimony or information concerning the nature of the communication problem . . . .").

85. *See id.* (recognizing that the ability to communicate better with one parent rather than the other "may be cause to award custody to that parent, [but] that is not what occurred in this case . . . . [Rather] the trial court was persuaded by the testimony of one of the experts that [Emily] was a girl who has a particular need for her mother and for a female hand").

86. *Id.* at 146-47, 716 A.2d at 1036.

ticular child and her needs and relationship with the parties,"[87] but was instead based solely on the gender of her parents.[88]

In a dissenting opinion, joined by Judges Raker and Karwacki, Judge McAuliffe argued that the majority had misinterpreted the record and that the trial judge did not use an impermissible consideration of gender to arrive at his decision.[89] The dissent maintained that

> . . . the oral opinion of the [trial court] . . . is perhaps inelegant and lacking in as complete a discussion of the rationale for the decision as may have been desired, but viewed in the context of the testimony and of prior statements of the [trial court], it is clear to me that the references to gender related to appropriate considerations.[90]

In support of his position, Judge McAuliffe reasoned that the witnesses were not saying that an adolescent daughter is always better able to communicate with her mother, but rather the witnesses were referring to this specific mother and daughter.[91] Judge McAuliffe also noted that this relationship was hardly atypical between a same-sex parent and child.[92]

4. Analysis.—In *Giffin v. Crane*, the Court of Appeals's misinterpretation of the facts, coupled with an overzealous application of ERA jurisprudence, resulted in a decision that has restricted the scope of the best interests of the child standard by prohibiting the consideration of any special relationship that exists between a same-sex parent and child. *Giffin* can be viewed as a collision between two lines of Maryland jurisprudence: child custody (applying best interests of the child standard) and equal rights under the ERA.[93] The decision, however, represents an inappropriate application of both precedents. In holding that a maternal award of custody based on the specific and particular need of a female child of a certain age to be with her same-sex parent violates Maryland's ERA,[94] the *Giffin* decision is at odds

87. *Id.* at 147, 716 A.2d at 1036.

88. *See id.* at 155, 716 A.2d at 1040.

89. *See id.* at 155, 716 A.2d at 1040 (McAuliffe, J., dissenting).

90. *Id.* at 155-56, 716 A.2d at 1040.

91. *See id.* at 156, 716 A.2d at 1040-41 (stating that the witnesses were discussing "the context of *this mother* and *this daughter*, and not some stereotypical figures").

92. *See id.*, 716 A.2d at 1041.

93. *See id.* at 151, 716 A.2d at 1038 (acknowledging that the "court has not had the occasion to address the issue this case presents, [however] our cases since the adoption of the Equal Rights Amendment and the legislature's action in enacting the family law article make clear what the proper result should be").

94. *See id.* at 155, 716 A.2d at 1040.

with the fundamental purpose of a child custody proceeding—to protect the best interests of the child.[95]

a. The Court's Reliance on Maryland Custody Law.—The Court of Appeals in *Giffin* properly recognized *Elza v. Elza*[96] for its precedential value, because *Elza* addressed the consideration of a parent's gender in the context of a custody dispute.[97] The court failed, however, to apply properly the *Elza* decision. The *Giffin* court claimed support from *Elza*, stating,

> [t]he trial court erred, . . . in the instant case; it assumed that the respondent [Crane] necessarily would be a better custodian solely because she has a female hand, and that a girl child of a certain age has a particular and specific need to be with her same sex parent. In so doing, as in *Elza*, the trial court applied an invalid legal principle. A review of the record . . . reveals, again, much as in the case of *Elza*, that, but for the trial court's perception of the need for a female hand for a girl child of Emily's age, that it believed each parent would be a proper and fit custodian.[98]

The court's analogy is flawed because careful analysis reveals that the facts of *Giffin* are distinguishable from those of *Elza* in two ways.

First, as Judge McAuliffe argued in his dissent, the trial court in *Giffin* did not base its decision on a maternal preference or presumption based on gender.[99] The trial court did not presume that Crane would be the better custodian because an adolescent daughter *always* has a psychological need to be with her mother.[100] Rather, the lower court's decision was based on the specific psychological need of this *particular* daughter to be with her mother.[101] Furthermore, the lower court's assessment of this particular daughter's need was supported by

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95. *See supra* note 33 (recognizing the best interests of the child as the most important consideration in child custody proceedings).

96. 300 Md. 51, 475 A.2d 1180 (1984).

97. *See id.* at 53, 475 A.2d at 1181. In *Elza*, the Court of Appeals recognized the abrogation of the maternal preference doctrine, which was used as a "tie-breaker" when the court was confronted with two equally fit parents. *Id.* at 58-59, 475 A.2d at 1184 (*citing* McAndrew v. McAndrew, 39 Md. App. 1, 382 A.2d 1081 (1977)).

98. *Giffin*, 351 Md. at 155, 716 A.2d at 1040.

99. *Id.* at 156, 716 A.2d at 1041 (McAuliffe, J., dissenting) (arguing that the trial court's decision in *Giffin* was "a far cry from establishing a preference or presumption based on gender").

100. *See id.* ("What is important to understand in this case is that the witnesses were not saying that an adolescent daughter is always better able to communicate with her mother . . . or that there is always an emotional need of a daughter to be with her mother.").

101. *See id.*; *supra* notes 90-92 and accompanying text.

her testimony that she could communicate better with her mother,[102] as well as the testimony of expert witnesses, who in discussing Emily's specific need, noted that this situation is hardly atypical and often occurs between a child of Emily's age and their same-sex parent.[103]

This is in contrast to *Elza*, where custody of a five-year old child was awarded to the mother simply because the child was female.[104] In *Elza*, unlike *Giffin*, there was no testimony of the specific child's psychological need to be with her mother. In fact, the chancellor stated, "I can't find anything wrong with either mother or father . . . . They are apparently both devoted to the child."[105] The chancellor went on to conclude that "[b]oth parties being equal here, I can't find that either party is not entitled to have the child. I suppose I am old fashion in one sense . . . but it still seems to me that if it's a five-year-old . . . all other factors being equal . . . that in that case, the child should go

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102. *See Giffin*, 351 Md. at 140-41, 716 A.2d at 1033 (noting that "Emily expressed the conclusion that she was more able to communicate with her mother"); *see also id.* at 156-58, 716 A.2d at 1040-42 (McAuliffe, J., dissenting) (discussing Emily's testimony to the effect that she could communicate readily with her mother about matters of concern to her that she could not discuss with her father).

103. *See id.* at 156, 716 A.2d at 1040-41 (McAuliffe, J., dissenting); *supra* note 92 and accompanying text. One of the experts to whom the court is referring is Dr. Joseph Poirier, expert witness for Giffin, who testified in relevant part as follows:

> Q: In comparison, mother was much warmer, I think you testified to?
> A: In [Emily's] perception, yes.
> Q: Okay.
> A: Now, again, that may be of that mother/daughter attachment thing, too. I mean, I did not find Mr. Giffin emotionally detached.
>
> * * * *
>
> Q: And that is because [Emily] perceives him as being more emotionally aloof, to use those same words?
> A: I would not characterize it that way. I could not tell you if [Emily] is more comfortable with the mom. That may be explainable just in terms of that specialized relationship she has. You know, I mean, If [sic] I can look at my own kids, when my kids were adolescents, they were much more comfortable going to my wife. There is a developmental thing there and it's not really necessarily a positive or a negative characterization against or on behalf of either parenting figure.
> Q: But the literature clearly recognizes the significance of that developmental factor that you were just taking about—
> A: Oh, yes.
> Q: —and the identification with the same sex parent is pretty common with someone this age; correct?
> A: And again, as I have already testified, it is something that ebbs and flows, yes.

Id. at 144, 716 A.2d at 1035 (alteration in original) (internal quotation marks omitted) (citation omitted).

104. *See* Elza v. Elza, 300 Md. 51, 56, 475 A.2d 1180, 1182 (1984) (concluding "that the trial court erroneously relied on the maternal preference presumption as the basis for his award of custody of the minor child to the mother").

105. *Id.* at 55, 475 A.2d at 1182.

with the mother . . . ."[106] Thus, *Giffin* can clearly be distinguished from *Elza* because while the trial court in *Giffin* did acknowledge that "both parents are caring parents, loving parents," the trial court did not proclaim both parents equal.[107] Rather, the trial court recognized that Emily had a special ability to communicate with her mother, an ability she had lacked with her father, and therefore should reside with her mother.[108]

Secondly, the trial court in *Giffin* did not employ gender considerations as a tiebreaker, as the trial court did in *Elza*. In *Giffin*, the chancellor stated that both parents were "caring parents, loving parents," and that the father "is a parent who can attend to all of [the children's] physical needs relevant to growing up in a healthy physical situation."[109] The trial court, however, did not claim that both parents were equally fit, as the trial court did in *Elza*.[110] The *Giffin* court failed to recognize that not only were Emily's physical needs at issue in the instant case, but her psychological needs were relevant as well.[111] While the trial court concluded that Giffin and Crane were both fully qualified to care for Emily's physical needs, the testimony elicited suggested that Crane was better able to satisfy Emily's psychological needs.[112]

As evidenced by the testimony of Dr. Mary Donahue, Emily's need was "a major emotional need to be with her mom" that was based on "a psychological issue and the need to bond with her mother psychologically based on where she was in the development issues."[113] Emily expressed a desire to live with her mother because she felt as

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106. *Id.*

107. *Giffin*, 351 Md. at 139, 716 A.2d at 1032.

108. *See supra* note 102 and accompanying text (discussing the trial court's decisions).

109. *Giffin*, 351 Md. at 139-40, 716 A.2d at 1032 (internal quotation marks omitted) (citation omitted).

110. *See Elza*, 300 Md. at 60, 475 A.2d at 1184 (noting that although "the [trial court] believed each parent would be a proper and fit custodian" the trial court "granted custody to Mrs. Elza because 'it's a five year old . . . all other factors being equal . . . that in that case, the child should go with the mother.'").

111. In stating that the father could "attend to all of [the children's] physical needs," one can logically presume that the trial court was referring to Giffin's ability to clothe and provide food and shelter for Emily and her sister. *See Giffin*, 351 Md. at 140, 716 A.2d at 1032. A consideration of which parent Emily can more readily communicate with, however, has nothing to do with her physical requirements. Rather, psychological need is at issue. *See* Hild v. Hild, 221 Md. 349, 357, 157 A.2d 442, 446 (1960) (discussing factors to be considered to determine which potential custodian is better suited to promote the child's best interests); Ester, *supra* note 27, at 239-41 (discussing the "psychological parent").

112. *Giffin*, 351 Md. at 156-57, 716 A.2d at 1041 (McAuliffe, J., dissenting) (discussing the trial judge's reasoning and testimony provided to demonstrate Crane's ability to satisfy Emily's emotional needs).

113. *Id.* at 156, 716 A.2d at 1041 (internal quotation marks omitted) (citation omitted).

though she could more readily talk with her mother about her concerns because "when there is a disagreement of sorts, [with her father] it requires a total examination and exhaustive study as to what is happening and so on."[114] Dr. Joseph Poirier also testified that Emily characterized "her father as being more emotionally aloof than her mother, who was much warmer"[115] and that "it's clear from the conversation [Emily has] had with me that she talks with her mother about a variety of things that are important to her, and I do not believe she shares those same things with her dad."[116] Dr. Donahue further added that "I think it's in a child's best interest to be with the parent with whom they feel most comfortable sharing their lives, the problems in their lives, or whatever are the things that are going on day to day."[117]

It is clear from the testimonies of Emily, Dr. Donahue, and Dr. Poirier that only Crane could fulfill Emily's psychological needs at this stage of her life. Thus, the majority court in *Giffin* was incorrect in deciding that the trial court deemed both parents equally fit and proper.[118] Therefore, the trial court did not use gender as a tiebreaker to decide between two equally capable parents.

Moreover, it is significant to note that the court in *Elza* appeared to recognize that the consideration of biological and psychological differences between parents in a custody decision would not violate the rule against awarding custody based solely on gender.[119] Although the *Elza* decision did not involve an ERA challenge, the court there did note that the legislative provision (article 72A) used to challenge the gender-based custody decision in *Elza* was the same one used in *Rand*.[120] This determination is significant because *Rand* involved a challenge under both article 72A and the ERA.[121] In deciding that the obligation for child support is shared by both parents, the

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114. *Id.* at 157, 716 A.2d at 1041 (internal quotation marks omitted) (citation omitted).

115. *Id.* (internal quotation marks omitted) (citation omitted).

116. *Id.* (internal quotation marks omitted) (citation omitted).

117. *Id.* at 157-58, 716 A.2d at 1041 (internal quotation marks omitted) (citation omitted).

118. As the dissent noted, "the oral opinion of the [trial judge], delivered from the bench after six days of trial, is perhaps inelegant and lacking in as complete a discussion of the rationale for the decision as may have been desired," but there is no indication that the trial court meant to deem both parents equally qualified to provide Emily with everything she needs physically and emotionally. *Id.* at 155-56, 716 A.2d at 1040.

119. *See* Elza v. Elza, 300 Md. 51, 59, 475 A.2d 1180, 1184 (1984) (noting that a determination of a child's best interests "require[s] an evolution of biological and psychological differences between the parents").

120. *See id.* at 54 n.1, 475 A.2d at 1182 n.1; *see also supra* note 38 (setting forth the text of article 72A).

121. *See* Rand v. Rand, 280 Md. 508, 509, 374 A.2d 900, 901 (1977).

Rand court noted that both the ERA and article 72A compelled this result.[122] Thus, it is plausible to suggest that the ERA and article 72A contain similar mandates when applied to child custody and to support proceedings, and that while the court in *Elza* recognized this similarly, it still felt that consideration of biological and psychological differences between parents were permissible. Unfortunately, the *Giffin* court disregarded this connection, as well seemingly dismissing *Elza*'s suggestion that gender, on some level, is a permissible consideration in child custody proceedings.[123]

b. Analysis of ERA Standard of Review Adopted.—The second flaw in the Court of Appeals's decision in *Giffin* is its failure to address properly the impact of *Burning Tree Club, Inc. v. Bainum.*[124] In *Burning Tree*, the court examined a claim that a facially neutral statute, which provided private country clubs with a tax deferral, violated the ERA.[125] In a complex discussion, the court in *Burning Tree* set forth two competing standards of review to be applied to facially neutral state actions or laws under the ERA.[126] Although the court cites bits and pieces of *Burning Tree*, it fails to consider fully the impact of *Burning Tree.*[127] Because *Giffin* involved the application of a facially neutral standard, the best interests of the child, it was incumbent on the Court of Appeals in *Giffin* to evaluate closely the impact of the *Burning Tree* decision.

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122. *See id.* at 516, 374 A.2d at 905 (concluding that the mandate of the ERA as well as the "clear import of the language of Art. 72A" requires that the parental obligation for child support be shared by both parents); *see also Giffin*, 351 Md. at 154, 716 A.2d at 1040 (noting that in 1984, the Maryland legislature deleted the language in article 72A that was found decisive in *Elza* and *Rand* because it was "unnecessary in light of the [ERA]").

123. *See Giffin*, 351 Md. at 155, 716 A.2d at 1040 (deciding that the trial court had erred in assuming a parent was a better custodian because her daughter had a "particular and specific need to be with her same sex parent"). *But see id.* at 156, 716 A.2d at 1040 (McAuliffe, J., dissenting) ("I do not understand the majority to hold that consideration of gender is always inappropriate in a custody case."). It is interesting to note that in its discussion of *Elza*, the *Giffin* court characterized *Elza*'s interpretation of article 72A as "express[ing] the intent of the General Assembly to eradicate sex as a factor in child custody proceedings." *Id.* at 152, 716 A.2d at 1039 (emphasis added). The *Elza* court, however, was never so categorical in its decision. Instead, it emphasized that custody awards could not be made solely on the basis of a parent's sex. *See Elza*, 300 Md. at 59, 475 A.2d at 1184 (holding "that the maternal preference doctrine is abolished . . . because it permits an award of custody to be made solely on the basis of the mother's sex").

124. 305 Md. 53, 501 A.2d 817 (1985).

125. *See supra* notes 63-67 and accompanying text (discussing the facts of the *Burning Tree* case).

126. *See supra* notes 68-72 and accompanying text (setting forth the standards of review enunciated in *Burning Tree*).

127. *Burning Tree*, 305 Md. 53, 501 A.2d 817 (setting forth two standards of ERA review).

Essentially, the *Giffin* court had two options under the *Burning Tree* decision. The *Giffin* court could have chosen to apply the test set forth by Chief Judge Murphy in *Burning Tree*, in which the absolute standard as enunciated in *Rand* would apply only if the challenged law or action imposed a burden or benefit on one sex but not on the other.[128] Under this analysis, the examination of a special relationship that often exists between a same-sex parent and child, when done in pursuance of determining the child's best interests, is equally available to both sexes.[129] Thus, protection under the ERA would not have been triggered in *Giffin* because, theoretically, both sexes were accorded equal treatment under the law.[130]

Alternatively, the *Giffin* court could have applied Judge Eldridge's analysis in *Burning Tree*, which would apply the ERA not only to gender-based classifications per se, but would also inquire into the discriminatory impact or purpose of gender-neutral laws as well.[131] Where gender discrimination is found, Judge Eldridge would apply an "at least strict scrutiny standard."[132] Under this standard of review, even if the *Giffin* court found that the consideration of the special relationship between mother and daughter did constitute a gender-based classification, such a classification could still be justified if a compelling state interest is demonstrated.[133] The *Giffin* court could have found the necessary substantial justification for the classification in the special nature of child custody proceeding in which the determination of a child's best interests is the paramount consideration, superseding the interests of the parents.[134] In addition, the court could have found support for substantial justification in the *Elza* deci-

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128. *See supra* note 68 and accompanying text (discussing the test proposed by Chief Judge Murphy).

129. It is plausible to imagine that a scenario similar to the one in *Giffin* could occur involving an award of custody based on a special relationship between a father and son.

130. *Compare* Giffin v. Crane, 351 Md. 133, 716 A.2d 1029 (1997), *with Burning Tree*, 305 Md. 53, 501 A.2d 817. In *Burning Tree*, Chief Judge Murphy determined that the statute in question did not violate the ERA because the tax benefit was available to all private clubs, "whether comprised of all men, all women, or of mixed membership." 305 Md. at 70, 501 A.2d at 825. Similarly in *Giffin*, the examination of a special relationship between a parent and a child was available to all relationships be it between a mother and a child or between a father and a child. *Giffin*, 351 Md. at 156-58, 716 A.2d at 1040-42 (discussing Emily's relationship with both her parents). Analogizing *Burning Tree* and *Giffin*, evidences that the consideration of a special relationship between a same-sex parent and child is not limited to one sex, and therefore, does not grant a benefit to one sex but not the other.

131. *See supra* note 70 and accompanying text (explaining Judge Eldridge's position on the standard of review to be applied to a facially neutral law challenged under the ERA).

132. *See supra* notes 70-72.

133. *See supra* notes 71-72 and accompanying text.

134. *See* discussion *supra* Part 3.a (discussing the best interests of the child standard and its paramount importance in child custody proceedings).

sion, which recognized the need to consider the biological and psychological differences between parents and the special relationships stemming therefrom when making custody decisions.[135]

c. Application of ERA Standard is at Odds with the Best Interests Standard.—Maryland cases demand that the determining factor in a child custody case is the best interests of the child.[136] This policy is paramount to all other considerations, with the rights of the parents being subordinate in relation to the question of the child's best interest.[137] Indeed, the *Giffin* court acknowledged this fundamental truth.[138] Yet the court failed to accord this principle its proper weight by placing the concerns of the adversarial parties—the parents—ahead of the interests of the child by focusing on the rights of the parents under the ERA rather than the welfare of the child.

Understandably, it is almost second nature to consider custody disputes in terms of adversaries' rights, especially for judges who deal with disputes over such rights on a daily basis.[139] In deciding a custody dispute, however, judges must consider that it is not the rights of the warring parties that are at issue; it is the well-being of the child.[140] In limiting the factors that may be considered in a best interests analysis based on the ERA, the *Giffin* court does injustice to the deeply rooted tradition of placing the best interests standard at the center of a child custody proceeding.

5. Conclusion.—In *Giffin v. Crane*, the Court of Appeals held that the sex of either parent may not be considered in the determination of a child's best interests in a custody proceeding. Through the court's misinterpretation of the facts of the case, and an overzealous

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135. *See* Elza v. Elza, 300 Md. 51, 60, 475 A.2d 1180, 1185 (1977) (discussing the court's recognition of the need to consider biological and psychological differences between parents in light of the *Rand* decision).

136. *See supra* note 33.

137. *See, e.g.*, Kartman v. Kartman, 163 Md. 19, 22, 161 A. 269, 271 (1932) (stating "[w]hen the custody of children is the question . . . the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that."); *see also* Ester, *supra* note 27, at 227 (noting that "Maryland cases have insisted that the determining factor [in custody cases] must always be the *child's* best 'interests'" (citation omitted)).

138. *See Giffin*, 351 Md. at 133, at 716 A.2d at 1035 (stating that the court is to be "guided first, and foremost, by what it believes would promote the child's best interest, which in custody disputes, is of transcendent importance").

139. *See* Ester, *supra* note 27, at 227 (pointing out that "[i]t may be tempting to think of custody disputes in terms of 'rights' and 'obligations', particularly for lawyers and judges who are likely to feel comfortable . . . with the process of analyzing a problem in terms of adversaries' rights" (citation omitted)).

140. *See id.* (stating that "[t]he court's ultimate purpose is not to secure an adult's rights, but to further a child's welfare").

application of Equal Rights Amendment jurisprudence, the court restricted the scope of the best interests of the child standard by prohibiting the consideration of any special relationship that exists between a same-sex parent and a child. Consequently, the court's decision is inconsistent with the best interests standard.

JENNIFER A. MATTHEWS

B. *Extending the Application of the Best Interests of the Child and Actual Harm Standard to Custody and Visitation Disputes Involving Homosexual Parents*

In *Boswell v. Boswell*,[1] the Court of Appeals identified the applicable standard for evaluating the extent of parental visitation restrictions in the presence of nonmarital, homosexual partners.[2] The court stated that the applicable standard in all visitation disputes would be "the best interests of the child, with visitation being restricted only upon a showing of actual or potential harm to the child resulting from contact with the non-marital partner."[3] Applying this standard to the facts of the case, the court did not find that the children suffered any actual harm as a result of the presence of Mr. Boswell's homosexual partner during visitation periods.[4] Therefore, the court determined that requiring Mr. Boswell's partner to be absent during visitation periods was improper.[5] The court relied on Maryland case law involving custody and visitation requests of heterosexual parents to evaluate a homosexual father's visitation rights in the presence of a nonmarital partner.[6] Accordingly, *Boswell* can be read to require that trial courts apply the best interests of the child and actual harm standard not only to cases involving a homosexual parent's visitation rights but also to cases involving a homosexual parent's request for custody. With its holding in *Boswell*, the court extended the application of the best interests of the child and actual harm standard to all custody and visitation disputes, thus broadening the ability of homosexual parents to gain both custody and visitation of their children. In clarifying the standard for these disputes, the court expressed its disapproval of the trial court's use of value preferences when making its determinations.[7] To combat similar improper influence, the *Boswell* court emphasized that trial courts must make factual findings demonstrating actual or likely harm to deny visitation rights to a parent when a nonmarital partner is present under the best interests of the child standard.[8]

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1. 352 Md. 204, 721 A.2d 662 (1998).

2. *Id.* at 209, 721 A.2d at 664.

3. *Id.*

4. *Id.* at 238, 721 A.2d at 678.

5. *Id.* at 209, 721 A.2d at 664.

6. *Id.*

7. *Id.* at 238, 721 A.2d at 678-79 (noting that, in previous cases, the Court of Appeals had "overturned the power of a trial court to use [a] blanket disapproval of a non-marital relationship as a basis for determining custody or visitation without a finding of adverse impact on children").

8. *Id.*

1. The Case.—In May 1986, Robert Boswell and Kimberly Boswell were married.[9] During their marriage, Mr. and Mrs. Boswell had two children, a son Ryan, born in 1988, and a daughter Amanda, born in 1991.[10] In August 1994, after Mr. Boswell told his wife that he was homosexual, the parties separated.[11] After the separation, Mr. Boswell began an intimate relationship with Robert Donathan, and in February 1995, Mr. Boswell began living with Mr. Donathan.[12] Ms. Boswell filed an initial complaint for divorce on October 5, 1994.[13]

On January 20, 1995, the Circuit Court for Anne Arundel County ordered visitation between Mr. Boswell and his children each Wednesday evening and every other weekend.[14] On April 1, 1996, Mr. Boswell moved for recusal of Judge Rushworth because of statements he made indicating a predisposition to limit Mr. Boswell's visitation and to permit no contact between the children and Mr. Boswell's partner, Mr. Donathan.[15] The court denied the motion.[16] On April 5, 1996, after a five-day trial, the court awarded sole custody to Ms. Boswell and severely limited Mr. Boswell's visitation rights.[17] The trial court's order prohibited any overnight visitation and prohibited visitation with the children in the presence of Mr. Donathan or "anyone having homosexual tendencies or such persuasions, male or female, or with anyone that the father may be living with in a non-marital relationship."[18] On August 22, 1996, pursuant to a second request by Mr. Boswell's counsel, Judge Rushworth recused himself from further proceedings in the case.[19] Mr. Boswell then appealed to the Court of Special Ap-

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9. *See id.* at 210, 721 A.2d at 664.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.* In accordance with the visitation order, visitation occurred with Mr. Donathan present. *See* Boswell v. Boswell, 118 Md. App. 1, 12, 701 A.2d 1153, 1158 (1997). At trial, Mr. Boswell testified that at first, he and Mr. Donathan slept in the same bedroom when the children came for visitation. *See id.* When it was revealed that this was upsetting Ryan, Mr. Boswell testified that he and Mr. Donathan began sleeping in separate bedrooms during visitation. *See id.* Mr. Boswell testified that he and Mr. Donathan agreed that Mr. Donathan would not take an active role in disciplining the children; Mr. Donathan would play with the children during visitation and participate in activities with appellant and the children at those times. *See id.*

15. *See Boswell*, 352 Md. at 210, 721 A.2d at 665.

16. *See id.*

17. *See id.* at 210-11, 721 A.2d at 665. The court limited Mr. Boswell's visits with his children to every other Saturday from 8:00 a.m. to 8:00 p.m., and every Wednesday from 3:00 p.m. to 8:00 p.m. on school days and from 8:00 a.m. to 8:00 p.m. on nonschool days. *See id.* at 211, 721 A.2d at 665.

18. *Id.* at 211, 721 A.2d at 665.

19. *See id.* at 212, 721 A.2d at 666.

peals, claiming that the trial court had failed to make any findings of fact upon which it based its visitation order.[20]

On October 29, 1997, the Court of Special Appeals vacated the judgment of the circuit court, including the prohibition against overnight visitation, and remanded this issue to the trial court.[21] In addition, the court vacated the prohibition against visitation in the presence of any nonmarital partner or any homosexual, without remand.[22] Ms. Boswell filed a Motion for Reconsideration and for Stay on November 12, 1997, alleging that the Court of Special Appeals erroneously applied an actual harm standard rather than the best interests of the child standard.[23] The Court of Special Appeals denied the Motion for Reconsideration and Stay on December 5, 1997, maintaining that it had applied the correct standard.[24] The Court of Appeals granted Ms. Boswell's petition for certiorari, which challenged only that portion of the Court of Special Appeals's order vacating the prohibition on visitation in the presence of Mr. Donathan.[25]

2. Legal Background.—

a. Best Interests of the Child Standard.—The United States Supreme Court has long held that a parent has a fundamental right to raise his or her children.[26] In *Skinner v. Oklahoma*,[27] the Court addressed an Oklahoma statute mandating that a vasectomy be performed on any person convicted two or more times for crimes "amounting to felonies involving moral turpitude."[28] In finding the statute unconstitutional, the Court explained that the ability to pro-

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20. *See id.* at 213, 721 A.2d at 666.

21. Boswell v. Boswell, 118 Md. App. 1, 11, 701 A.2d 1153, 1157-58 (1997).

22. *Id.* The Court of Special Appeals held that there was no evidentiary basis for the trial court to conclude that the relationship between Mr. Boswell and Mr. Donathan was harmful to the children. *Id.* at 11, 701 A.2d at 1158. The intermediate appellate court vacated the prohibition of any visitation of the children by the father in the presence of any homosexual based on the failure to show harm to the children that would result from such contact. *Id.*

23. *See Boswell*, 352 Md. at 213, 721 A.2d at 666.

24. *See id.*

25. *See id.* at 214, 721 A.2d at 666.

26. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing that caring for a family is a private realm into which states cannot enter); Pierce v. Society of Sisters of Holy Names, 268 U.S. 510, 519 (1925) (maintaining a parent's authority to school his or her children at home by striking down a state statute requiring attendance at public school); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (holding unconstitutional a statute disallowing parents to teach their children in languages other than English).

27. 316 U.S. 535 (1942).

28. *Id.* at 536.

duce and raise children involves one of man's basic civil rights.[29] Thirty years later, in *Wisconsin v. Yoder*,[30] the Court recognized parents' fundamental right to care for their children.[31] In *Yoder*, the Court held that the state of Wisconsin could not compel Amish parents to send their children to school once they had finished the eighth grade.[32]

Maryland has followed the Supreme Court in recognizing the fundamental right of a parent to raise his or her children. In *Carter v. Carter*,[33] the Court of Appeals stated:

> It is the rule of the common law that parents have the natural right to the custody of their children, and that, as between the mother and father, the primary right to the custody of the children is in the father, since it is his duty to provide for his children's protection, maintenance, and education.[34]

The court clarified that although the right of the father is usually superior to that of the mother, "this rule must yield to the paramount consideration of what will be for the best interest of the children and most conducive to their welfare."[35] Similarly, in *In re Adoption No. 10941*,[36] the court stated that the right of a parent to raise his child is "recognized by constitutional principles, common law and statute, [and] is so fundamental that it may not be taken away unless clearly justified."[37]

Although the factors that have been taken into consideration when deciding what is best for a child in custody and visitation disputes have changed over the years,[38] the Court of Appeals has long

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29. *See id.* at 541 ("We are dealing here with legislation which involves the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.").

30. 406 U.S. 205 (1972).

31. *Id.*

32. *Id.* at 234.

33. 156 Md. 500, 144 A. 490 (1929).

34. *Id.* at 505, 144 A. at 492.

35. *See id.* Note, however, that Maryland has since entirely disposed of the notion that fathers have a superior right to the custody of their children. *See, e.g.*, Ross v. Hoffman, 280 Md. 172, 176-77, 372 A.2d 582, 586 (1977) (holding that the common law concept that the primary right to custody was in the father has been abrogated but that there still exists a superior right to custody of a parent over anyone else).

36. 335 Md. 99, 642 A.2d 201 (1994).

37. *Id.* at 112, 642 A.2d at 208.

38. *See infra* note 57 and accompanying text (discussing the reversal of the presumption of unfitness on the part of an adulterous parent following *Davis v. Davis*, 280 Md. 119, 372 A.2d 231 (1977)).

applied the best interests of the child standard. In *Pangle v. Pangle*,[39] a dispute regarding the custody of a divorced couple's only daughter, the Court of Appeals stated that "[t]he primary concern in cases of this nature is to make such an award of the custody of the child as will promote its highest welfare."[40] Ten years later, in *Carter v. Carter*,[41] the Court of Appeals similarly based its grant of custody to a child's father on the best interests of the child standard.[42] The court explained that because the father had married again, and could provide the child with a safe, comfortable home, "the child's material welfare will best be promoted by his remaining in his father's custody."[43] Because the court was unsure as to the fitness of the mother to raise her child,[44] it decided it would be in the boy's best interests to remain with his father.[45]

In *Hild v. Hild*,[46] the Court of Appeals clarified the best interests standard by outlining several factors to be used in determining what is in the best interests of a child:

> [T]he fitness of the persons seeking custody, the adaptability of the prospective custodian to the task, the age, sex and health of the child, the physical, spiritual and moral well-being of the child, the environment and surroundings in which the child will be reared, the influences likely to be exerted on the child, and, if he or she is old enough to make a rational choice, the preference of the child.[47]

The court stressed that while these factors were to be considered in deciding what is in the best interests and welfare of a child, the most important consideration must still be the overall well being of the child.[48] In *Taylor v. Taylor*,[49] the Court of Appeals relied on factors similar to the ones it articulated in *Hild* when considering a petition

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39. 134 Md. 166, 106 A. 337 (1919).

40. *Id.* at 170, 106 A. at 338.

41. 156 Md. 500, 144 A. 490 (1929).

42. *Id.* at 505, 144 A. at 492 (stating that the "paramount consideration" would be "what will be for the best interest of the children and most conducive to their welfare").

43. *Id.* at 506, 144 A. at 492. The custody of the eight-year-old child had been divided between the parents. *See id.* at 502, 144 A. at 492. Mr. Carter appealed that decree and was seeking to obtain the exclusive guardianship and custody of the child. *See id.*

44. Mr. Carter alleged that Mrs. Carter secretly took the child from him in New York, in an attempt to relocate in Canada. *See id.* at 506-07, 144 A. at 493.

45. *See id.* at 507, 144 A. at 493.

46. 221 Md. 349, 157 A.2d 442 (1960).

47. *Id.* at 357, 157 A.2d at 446 (citing 2 NELSON, DIVORCE AND ANNULMENT § 15.01 (2d ed. 1945)).

48. *Id.*

49. 306 Md. 290, 508 A.2d 964 (1986).

for joint custody of two minor children.[50] The court recognized, however, that while a list of specific criteria is helpful, "none has talismanic qualities, and . . . no single list of criteria will satisfy the demands of every case."[51]

b. Combining the Best Interests of the Child Standard with the Showing of Actual or Potential Harm to the Children.—When the best interests of the child standard is used to limit custody or visitation based on the presence of a nonmarital partner, Maryland courts also require a showing of actual harm resulting from contact with the nonmarital partner. In *Swain v. Swain*,[52] the Court of Special Appeals stated that "adultery is relevant only insofar as it *actually* affects a child's welfare."[53] The intermediate appellate court instructed the lower court to consider only the harmful effects of the adultery on the children, not the adultery itself.[54] Similarly, in *Robinson v. Robinson*,[55] the Court of Appeals upheld the lower court's grant of custody to an adulterous wife, basing its decision, in part, on the fact that there was no evidence that the adulterous conduct had any adverse effect on the child.[56] Therefore, only when actual or potential harm from contact with the parent can be proven, will a Maryland court deny custody and limit visitation.

c. Application of the Best Interests and Actual Harm Standards to the Custody and Visitation of a Heterosexual Parent.—In *Davis v. Davis*,[57] the Court of Appeals eliminated the use of a per se rule whereby courts presumed the unfitness of an adulterous parent seeking custody of his or her children.[58] Prior to *Davis*, Maryland courts regularly awarded custody of a child to a parent when it could be proven that the other parent had been involved in an adulterous affair.[59] In *Davis*, however, the court stated that "whereas the fact of adultery may be a

50. *Id.* at 307-11, 508 A.2d at 972-74 (discussing factors to be considered including the willingness of parents to share custody, the fitness of parents, the age and number of children, and the financial status of the parents).

51. *Id.* at 303, 508 A.2d at 970.

52. 43 Md. App. 622, 406 A.2d 680 (1979).

53. *Id.* at 629, 406 A.2d at 683 (1979).

54. *Id.*, 406 A.2d at 684.

55. 328 Md. 507, 615 A.2d 1190 (1992).

56. *Id.* at 519-20, 615 A.2d at 1196.

57. 280 Md. 119, 372 A.2d 231 (1977).

58. *Id.* at 131-32, 372 A.2d at 237.

59. *See, e.g.*, Hild v. Hild, 221 Md. 349, 360, 157 A.2d 442, 448 (1960) (stating that the presumption against awarding the custody of a son to a mother who was guilty of committing adultery was not overcome); Pangle v. Pangle, 134 Md. 166, 169-70, 106 A. 337, 338 (1919) (awarding custody to the father based on the unfitness of the adulterous mother).

relevant consideration in child custody awards, no presumption of unfitness on the part of the adulterous parent arises from it."[60] In affirming the Court of Special Appeals's grant of custody to the girl's mother, the Court of Appeals noted that although Ms. Davis had engaged in an adulterous relationship in the past, there was no reason to believe that her conduct ever had a negative effect on her daughter.[61]

Following the *Davis* decision, the Court of Special Appeals, in *Draper v. Draper*,[62] reversed a trial court decision on the basis that the court had improperly applied a presumption of unfitness based on the mother's adultery.[63] The court also found that the chancellor had failed to take into consideration other pertinent factors in making its decision[64] and instead, focused on the prior sexual conduct of the mother.[65] The court remanded the case to the trial court, instructing it to abandon the presumption of unfitness on the part of the adulterous mother.[66]

Exposure of a child to a parent's sexual relationship outside of marriage also does not automatically preclude that parent from gaining custody in Maryland. The Court of Appeals, in *Robinson v. Robinson*,[67] upheld a trial court's decision that although the mother was engaged in a sexual relationship outside of marriage, the best interests of the child would be served by granting custody of the child to her.[68] Ms. Robinson's boyfriend frequently stayed overnight at her home, and thus, her son was exposed to their living arrangement.[69] Mr. Robinson argued that "this amoral atmosphere [was] not in the child's best interest and that it should [have tipped] the scale in favor of his getting custody."[70] The court found, however, that other factors, such as "custodial continuity, stability and . . . frequent interac-

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60. 280 Md. at 127, 372 A.2d at 235.

61. *See id.* at 131, 372 A.2d at 237.

62. 39 Md. App. 73, 382 A.2d 1095 (1978).

63. *See id.* at 79, 382 A.2d at 1098.

64. The court noted that the child appeared to be

> a happy, normal, and healthy little girl; that the environment and living conditions at the home of her grandparents where she resided with her natural mother were entirely proper and adequate; that the mother was, at that time, a full-time mother and that the maternal grandmother was available to care for her should the natural mother obtain employment.

Id.

65. *Id.* ("We believe it quite clear . . . that . . . the lower court applied a presumption of unfitness on the basis of the wife's prior immoral conduct.").

66. *Id.* at 79-80, 382 A.2d at 1098.

67. 328 Md. 507, 615 A.2d 1190 (1992).

68. *Id.* at 520, 615 A.2d at 1196-97.

69. *See id.* at 511, 615 A.2d at 1192.

70. *Id.*

tion in an extended family create an advantage to custody with the wife."[71] The Court of Appeals, applying the best interests of the child standard, concluded that the trial court's findings were supported sufficiently by evidence, and thus, the award of custody to the mother was justified.[72]

Courts in other jurisdictions have applied the same best interests of the child and actual harm standards to cases involving a heterosexual parent seeking custody of his or her child. For example, the Wisconsin Court of Appeals, in *Schwantes v. Schwantes*,[73] required that the trial court identify an adverse effect on the children before denying custody to a parent based on a nonmarital relationship.[74] In *Schwantes*, the trial court found both parents fit to raise their three children, but awarded custody to the mother on the condition that she terminate her relationship with her current boyfriend.[75] The Court of Appeals found that because no actual harm to the children had been established, "the trial court had no authority to condition the custody award on her termination of that relationship."[76] Similarly, in *Draper v. Draper*,[77] a Florida trial court conditioned the award of custody to a mother on not allowing her boyfriend to be in the presence of her children or at their home.[78] Because the court ordered this restriction without any finding of actual harm to the children, the appellate court concluded that the trial court's decision was an abuse of discretion and therefore removed the condition from the custody award.[79]

Maryland courts have applied the best interests of the child and actual harm standards to both custody and visitation disputes.[80]

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71. *Id.* at 512-13, 615 A.2d at 1193.

72. *Id.* at 519-20, 615 A.2d at 1196-97.

73. 360 N.W.2d 69 (Wis. Ct. App. 1984).

74. *Id.* at 77 ("[W]e can conceive of no valid interest which would be served by requiring a parent to terminate a personal relationship, as a condition of custody, without some showing that the relationship has an adverse affect on the children.").

75. *Id.* at 70.

76. *Id.* at 78.

77. 403 So. 2d 989 (Fla. Dist. Ct. App. 1981).

78. *See id.* at 989.

79. *Id.* at 989-90; *see also* Smith v. Smith, 396 So. 2d 252, 253-54 (Fla. Dist. Ct. App. 1981) (holding that the trial court erred in ruling that a mother could not have any unrelated men visit while her children were present because the court failed to make the required finding that such male visitors would adversely affect the children).

80. *See, e.g.*, Beckman v. Boggs, 337 Md. 688, 703 n.7, 655 A.2d 901, 908 n.7 (1995) (noting that "visitation, which is considered to be a form of temporary custody, and custody determinations are generally governed by the same principles"); *cf.* Skeens v. Paterno, 60 Md. App. 48, 61, 480 A.2d 820, 826 (1984) (stating that "under the circumstances, the ultimate test for *custody* and *visitation* is the best interests of the child" (emphasis added)).

Therefore, in determining visitation rights, the Maryland Court of Special Appeals has concluded that the best interests of the child and actual harm standards must be the ultimate test.[81] In *John O. v. Jane O.*,[82] the trial court limited overnight visitation of the father because his thirteen-year-old son reported that he had "touched him in an inappropriate manner during one of the child's previous overnight visits."[83] Additional testimony suggested that Mr. O had not taken significant interest in his son prior to the divorce proceedings.[84] Examining all of the factors together, the court concluded that the best interests of the child would be achieved by refusing to allow overnight visitation by Mr. O with his son.[85] Following the same reasoning, the Court of Special Appeals, in *Hanke v. Hanke*,[86] refused to grant a father overnight visitation rights because it was not in the best interests of the child.[87] A report by the Department of Social Services recommended that visitation be supervised, and that Mr. Hanke never be left alone with the child.[88] This report was based on an accusation of sexual abuse by the child filed by Ms. Hanke, and the child's account of inappropriate touching by her father.[89] Based on these findings, and the fact that "the ultimate test for custody and visitation is the best interests of the child," the court found that overnight visitation by the father should not be permitted.[90]

The Court of Special Appeals also applied the best interests of the child and actual harm standards to a situation of domestic abuse in *Painter v. Painter*.[91] The trial court found that Mr. Painter exhibited violent behavior towards Mrs. Painter and their children.[92] It further explained that the atmosphere of violence in the household caused their son, Daniel, to experience emotional instability.[93] Based on

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81. *See* Painter v. Painter, 113 Md. App. 504, 521, 688 A.2d 479, 487 (1997) (finding that the husband's severe domestic abuse justified limits on visitation); John O. v. Jane O., 90 Md. App. 406, 435, 601 A.2d 149, 163 (1992) (abrogated on other grounds) (finding that the evidence supported the trial court's refusal to allow overnight visitation); Hanke v. Hanke, 94 Md. App. 65, 71-72, 615 A.2d 1205, 1209 (1992) (finding that overnight visitation was not in the best interests of the child).

82. 90 Md. App. 406, 601 A.2d 149 (1992).

83. *Id.* at 410-11, 601 A.2d at 151.

84. *See id.* at 431, 601 A.2d at 161.

85. *Id.*

86. 94 Md. App. 65, 615 A.2d 1205 (1992).

87. *Id.* at 66, 615 A.2d at 1206.

88. *See id.* at 66-67, 615 A.2d at 1206.

89. *See id.* at 66, 615 A.2d at 1206.

90. *Id.* at 71-72, 615 A.2d at 1209.

91. 113 Md. App. 504, 518, 688 A.2d 479, 485-86 (1997).

92. *See id.* at 509, 688 A.2d at 481.

93. *Id.* at 519, 688 A.2d at 486.

these findings, the trial court felt that it would be in Daniel's best interests to deny visitation and any further contact between Mr. Painter and his son.[94] Given the evidence of abuse, the Court of Special Appeals upheld the trial court's denial of visitation.[95]

The awarding of visitation in other jurisdictions has also been governed by the best interests of the child and actual harm standard. In Florida, an appellate court reversed a trial court's decision to restrict a mother's visitation to times when she was not in the presence of her boyfriend.[96] The court noted that "[w]ithout competent and substantial evidence of the detrimental effect on the children caused by her lover's presence during the mother's visits, the limitation imposed by the trial court cannot stand."[97] Similarly, in *Moreau v. Moreau*,[98] the Court of Appeal of Louisiana held that restricting a father's visitation to times when no unrelated adult woman was present was improper as the evidence did not indicate that such female company had an adverse effect on the children.[99]

d. Application of the Best Interests and Actual Harm Standards to the Custody and Visitation of a Homosexual Parent.—

(1) Granting Custody to a Homosexual Parent.—Maryland has not yet decided a custody dispute in which a homosexual parent sought custody of his or her child. In other jurisdictions, however, courts generally apply a best interests of the child standard coupled with a required showing of actual or potential harm to the child in custody disputes involving the presence of the nonmarital partner.[100] In *M.A.B. v. R.B.*,[101] the New York Supreme Court approved a grant of custody to a homosexual father.[102] The court recognized that in dealing with custody disputes, the main concern is the child's best inter-

94. *See id.*

95. *See id.* at 521, 688 A.2d at 487.

96. *See* Trylko v. Trylko, 392 So. 2d 1034, 1036 (Fla. Dist. Ct. App. 1981).

97. *Id.* at 1035-36.

98. 422 So. 2d 734 (La. Ct. App. 1982).

99. *Id.* at 736 ("There is nothing in this record to indicate that visiting anywhere with their father would be injurious to these children."); *see also* Harrington v. Harrington, 648 So. 2d 543, 547 (Miss. 1994) (holding that the fact that the father was living with a woman did not warrant disallowing overnight visitation).

100. *See, e.g.*, Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983) (holding that the mother's homosexual relationship did not preclude a grant of custody to her); Nadler v. Superior Court, 63 Cal. Rptr. 352, 354 (Cal. Ct. App. 1967) (per curiam) (holding that the lower court had failed in its duty to determine what was in the best interests of the child when it held, as a matter of law, that the mother was unfit to have custody based on the fact that she was a homosexual).

101. 510 N.Y.S.2d 960 (N.Y. Sup. Ct. 1986).

102. *Id.* at 970.

ests.[103] After reviewing relevant case law, the court found that "it is impermissible as a matter of law to decide the question of custody on the basis of the father's sexual orientation."[104] Similarly, in *In re Jacinta M.*,[105] the Court of Appeals of New Mexico required direct evidence that exposure of a child to her brother's homosexuality was not in the child's best interests before it would deny the brother custody of the child.[106] Because there was no evidence in the record that the brother was unfit to care for his younger sister, the court found that it was in the best interests of the child to remain with her brother.[107]

In evaluating the grant of custody to a homosexual parent, other jurisdictions have disallowed consideration of possible embarrassment resulting from the parent's sexual orientation as a factor in its determination. For example, in *S.N.E. v. R.L.B.*,[108] the Supreme Court of Alaska remanded a trial court custody decision because the trial court had relied too heavily on the fact that the mother was a lesbian in granting custody to the father.[109] The court stated that "it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian."[110] Additionally, the Alaska court found no evidence of actual harm to the child because he was being raised by a lesbian mother.[111] In *M.P. v. S.P.*,[112] the Superior Court of New Jersey reached a similar conclusion in reversing a lower court's grant of custody to a heterosexual father instead of a homosexual mother.[113] The Superior Court determined that the trial court had erroneously based its decision on its belief that the mother's lesbian

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103. *Id.* at 969.

104. *Id.*

105. 764 P.2d 1327 (N.M. Ct. App. 1988).

106. *Id.* at 1330 (citing D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981) (finding that homosexuality, standing alone without evidence of any adverse effect upon welfare of children, would not render a wife unfit as a matter of law to have custody); Guinan v. Guinan, 477 N.Y.S.2d 830 (N.Y. App. Div. 1984) (stating that a parent's sexual indiscretions should be a consideration in a custody dispute only if they are shown to adversely affect the child's welfare); DiStefano v. DiStefano, 401 N.Y.S.2d 636 (N.Y. App. Div. 1978) (holding that in custody contests, the sexual lifestyle of a parent may properly be considered in determining what is best for children, but its consideration must be limited to its present or reasonably predictable effect on the children's welfare)).

107. *In re Jacinta M.*, 764 P.2d at 1330.

108. 699 P.2d 875 (Alaska 1985).

109. *Id.* at 878-80 (stating that the father's argument that the case did not involve "sexual preference discrimination issues . . . [was] not supported by the record, which [was] replete with evidence that [the] mother is a lesbian").

110. *Id.* at 879.

111. *Id.*

112. 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979).

113. *Id.* at 1263.

status would be embarrassing to the children, instead of on factors pertaining to the best interests of the children.[114]

(2) Granting Visitation to a Homosexual Parent.—The Court of Special Appeals of Maryland was confronted with the issue of homosexual parental visitation rights for the first time in *North v. North.*[115] The trial court, in *North*, granted the father certain visitation rights,[116] but denied his request for overnight visitation with his children.[117] On appeal, the Court of Special Appeals concluded that the trial court had improperly denied overnight visitation to Mr. North.[118] The intermediate appellate court found that the restriction on overnight visitation was not supported by the evidence admitted during the trial.[119] Therefore, the court held that the trial court had abused its discretion in denying overnight visitation, while allowing visitation during the day even though there was no evidence that Mr. North "was more likely to expose the children to 'events or functions' espousing a homosexual lifestyle on Friday or Saturday evening than during the afternoon."[120]

In other jurisdictions, courts have refused to allow visitation to be restricted on the basis of a parent's homosexuality alone.[121] For example, the California Court of Appeals overturned a lower court's or-

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114. *Id.* at 1260-61 ("The only conclusion to be drawn is . . . that the custody order was modified for the sole reason that [the mother] is a homosexual and without regard to the welfare of the children.").

115. 102 Md. App. 1, 648 A.2d 1025 (1994).

116. The Circuit Court for Prince George's County allowed Mr. North unsupervised visitation from 11:00 a.m. to 6:00 p.m. on alternating Saturdays and from 2:00 p.m. to 7:00 p.m. on alternating Sundays. *See id.* at 3, 648 A.2d at 1026-27.

117. *See id.* at 3, 648 A.2d at 1027.

118. *Id.*

119. *Id.* at 14-15, 648 A.2d at 1032. The court concluded that the trial court had not based its decision on any finding of unfitness based on Mr. North's homosexual status; rather, the circuit court focused on the potential harm to the children that could arise from the visitation. *Id.* at 15, 648 A.2d at 1032. The Court of Special Appeals stated that "[t]he disqualifying factor was not Mr. North's HIV status so much as the perceived harm arising from exposure of the children to his 'homosexual lifestyle.'" *Id.* at 11, 648 A.2d at 1030.

120. *Id.* at 16, 648 A.2d at 1033.

121. *See* In the Interest of R.E.W., 471 S.E.2d 6, 9 (Ga. 1996) (allowing unsupervised visitation between a homosexual father and his son, stating that "the primary consideration in determining custody and visitation issues is not the sexual mores or behavior of the parent, but whether the child will somehow be harmed by the conduct of the parent"); Pleasant v. Pleasant, 628 N.E.2d 633, 635 (Ill. App. Ct. 1993) (holding that visitation could not be restricted based on mother's homosexual relationship); Conkel v. Conkel, 509 N.E.2d 983, 985 (Ohio Ct. App. 1987) (holding that a homosexual father could not be denied overnight visitation with his children based solely on his homosexuality, without evidence that the children would be harmed by the visitation).

der prohibiting a homosexual father from having overnight visitation with his son while any homosexual was present in *Birdsall v. Birdsall*.[122] The Court of Appeals concluded that Mr. Birdsall's son experienced no present harm as a result of his father's homosexuality.[123] The court recognized that under the best interests of the child standard, visitation could be restricted only upon a showing of actual harm to the child.[124] Thus, "in the absence of any indication of harm," the court concluded that the restraining order was unreasonable and vacated it.[125]

The Court of Appeals of Oregon came to an identical conclusion in *In re Marriage of Ashling*,[126] finding that the lower court had erroneously defined the provisions of the mother's visitation with her three children.[127] The trial court directed that visitation be "limited to such times and places that [the mother] does not have with her, in her home, or around the children any lesbians."[128] The Court of Appeals eliminated this restriction, concluding that the mother's sexuality had not been proven to have a harmful effect on her children.[129]

3. The Court's Reasoning.—In *Boswell*, the Court of Appeals was asked to clarify the standard a court should apply in determining the extent of restrictions on parental visitation of children in the presence of a homosexual nonmarital partner.[130] The Court of Appeals affirmed the Court of Special Appeals' judgment and clarified that the correct standard to be applied in disputes involving both homosexual and heterosexual nonmarital relationships "is the best interests of the child, with visitation being restricted only upon a showing of actual or

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122. 243 Cal. Rptr. 287, 291 (Ct. App. 1988).

123. *Id.* at 290 ("After reviewing this record, we conclude the evidence of detriment to the child is insufficient to support restricted visitation with the father.").

124. *Id.* (noting that "an affirmative showing of harm or likely harm to the child is necessary in order to restrict parent custody or visitation").

125. *Id.* at 291. The restraining order prohibited Mr. Birdsall from "exercis[ing] overnight visitation . . . in the presence of anyone known to be homosexual." *Id.*

126. 599 P.2d 475 (Or. Ct. App. 1979).

127. *Id.* at 476.

128. *Id.*

129. *Id.*; *see also In re* the Marriage of Wicklund, 932 P.2d 652, 655 (Wash. Ct. App. 1996) (holding that the trial court erred in conditioning the homosexual father's visitation with his children on "not practic[ing] homosexuality in the sense of exhibiting, or participating in displays of affection . . . with a partner 'guest,' or significant other [in the presence of his children]"); Blew v. Verta, 617 A.2d 31, 37 (Pa. Super. Ct. 1992) (holding that the lower court erred in its order prohibiting the homosexual mother from visiting her son if her female partner was present); *In re* the Marriage of Walsh, 451 N.W.2d 492, 493 (Iowa 1990) (holding that the trial court erred in restricting a homosexual father's visitation to times when "no unrelated adult' was present").

130. *Boswell*, 352 Md. at 209, 721 A.2d at 664.

potential harm to the child resulting from contact with the nonmarital partner."[131] The court stressed that the best interests of the child was "'of transcendent importance' and the 'sole question' in familial disputes; indeed, it is 'therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.'"[132] Although the court recognized that parents have a fundamental right to raise their children, it noted that in custody and visitation disputes, the best interests of the child may outweigh the parent's right.[133]

The court then reviewed Maryland case law establishing that the best interests of the child must be the ultimate test for granting custody to a parent.[134] The court also reiterated that, following *Davis v. Davis*, there is no longer a presumption that an adulterous parent is unfit to have custody of his or her children.[135] Furthermore, in *Boswell*, the court clarified that "these best interest factors also apply to visitation, as well as any other proceeding where the best interest of the child is at issue."[136]

The court next addressed the connection between the best interests of the child standard and the requirement to show actual harm.[137] The court explained that the proper test to be used is "a best interests of the child standard concurrently with adverse impact, granting the modification or restriction only upon a showing of actual emotional or physical harm to the child."[138] The court clarified the test by stating that "in restricting visitation, actual or potential harm is a component of the best interests standard and not a separate and distinct standard . . . ."[139]

Next, the Court of Appeals emphasized the requirement of showing a nexus between the harm suffered by the child and the contact

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131. *Id.*

132. *Id.* at 219, 721 A.2d at 669 (quoting Taylor v. Taylor, 306 Md. 290, 303, 508 A.2d 964, 970 (1986)).

133. *Id.* The court explained that according to the United States Supreme Court, a parent has a fundamental right to the care and custody of his or her children. *Id.* at 217-18, 721 A.2d at 668 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters of Holy Names, 268 U.S. 510 (1925); Meyer v. Nebraska, 267 U.S. 390 (1923)).

134. *Id.* at 218-25, 721 A.2d at 669-72; *see also supra* Part 2.c (discussing custody grants to heterosexual parents).

135. *Id.* at 224, 721 A.2d at 671.

136. *Id.* at 222, 721 A.2d at 670-71.

137. *Id.* at 225-28, 721 A.2d at 672-74.

138. *Id.* at 225, 721 A.2d at 672.

139. *Id.* at 228, 721 A.2d at 673.

with the nonmarital partner.[140] According to the *Boswell* court, if a trial court were to find evidence of an adverse impact, it must also find a nexus between that harm and the contact with the nonmarital partner before restricting a parent's custody or visitation rights.[141] The court stated that "[i]f no clear, direct connection is found, then the non-custodial parent's visitation rights cannot be restricted."[142]

Clarifying that the actual harm and nexus tests apply equally to heterosexuals and homosexuals, the court then applied the standard to the situation involving Mr. and Mrs. Boswell.[143] The court found that neither Ryan nor Amanda suffered any actual or potential harm as a result of their contact with Mr. Donathan, their father's partner.[144] The court noted that no party in the case had requested that Mr. Boswell's visitation be restricted; rather, the trial court took it upon itself to impose the restrictions because of "its own biases and belief that Mr. Boswell's relationship with Mr. Donathan was 'inappropriate.'"[145] Pursuant to *Davis*, the court explained that the power of a trial court to base custody or visitation determinations on its own disdain for a nonmarital relationship was improper.[146] Therefore, because the trial court had made no factual findings of any actual harm to the children, the Court of Appeals held that the Court of Special Appeals was correct in vacating the visitation order prohibiting visitation in the presence of Mr. Donathan.[147] In vacating the visitation order, the court explained that "it has not been shown to be in Ryan and Amanda's best interests to curtail visitation so as to restrict Mr. Donathan from their lives."[148]

4. Analysis.—In *Boswell*, the Court of Appeals articulated, for the first time, the full standard to be applied by trial judges when evaluating custody and visitation rights.[149] The *Boswell* court found that a

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140. *Id.* at 236-38, 721 A.2d at 677-79.

141. *Id.*

142. *Id.* at 237, 721 A.2d at 678.

143. *Id.* at 238-40, 721 A.2d at 678-80 (stating that "the . . . approach we outline today regarding visitation restrictions in the presence of non-marital partners applies to both heterosexual and homosexual relationships").

144. *Id.* at 238, 721 A.2d at 678 ("[W]e find no clear, direct connection between the presence of [Mr. Boswell's partner] and actual or potential harm to either [child] that justifies restricting Mr. Boswell's parental visitation.").

145. *Id.*

146. *Id.* at 238, 721 A.2d at 679; *see also supra* note 57 and accompanying text (discussing the elimination of the presumption of unfitness of an adulterous parent by the *Davis* court).

147. *Id.* at 239, 721 A.2d at 679.

148. *Id.*

149. 352 Md. 204, 225, 721 A.2d 662, 672 (1998).

parent's visitation rights with his or her child could not be restricted on the basis of the parent's homosexuality or the presence of a nonmarital homosexual partner in the home.[150] As a case of first impression, the court, in reaching its conclusion, relied on Maryland case law involving custody and visitation disputes where the presence of a nonmarital heterosexual partner was at issue.[151] In fact, the court concluded that the applicable standard for visitation disputes involving homosexual parents and the presence of nonmarital homosexual partners was identical to the standard used in custody and visitation disputes involving heterosexual parents.[152] Because one standard—best interests of the child plus actual harm—is applied to heterosexual custody and visitation disputes, the identical standard will apply to visitation disputes, as held in *Boswell*, as well as to custody disputes involving homosexuals. Thus, *Boswell* can be read to require that trial courts apply the best interests/actual harm standard not only to visitation disputes involving a homosexual parent, but also to custody disputes involving a homosexual parent. More importantly, the court's articulation of a broad, factual standard requiring proof of actual harm to a child will limit the discretion of trial courts and obviate instances of improper bias against homosexual parents.

a. The Broad Application of the Best Interests of the Child Standard Demonstrates that the Sexuality of a Parent is Not an Issue.—The *Boswell* court stated that the standard it applied, best interests/actual harm, "applies to both heterosexual and homosexual relationships."[153] In rejecting the presumption that exposure to a homosexual relationship was harmful to a child, the court discussed cases in

150. *Id.* at 240, 721 A.2d at 679.

151. *Id.* at 225-28, 721 A.2d at 672-74 (discussing Robinson v. Robinson, 378 Md. 507, 615 A.2d 1190 (1992); Queen v. Queen, 308 Md. 574, 521 A.2d 320 (1987); Swain v. Swain, 43 Md. App. 622, 406 A.2d 680 (1979); Davis v. Davis, 280 Md. 119, 372 A.2d 231 (1977); North v. North, 102 Md. App. 1, 648 A.2d 1025 (1994)). While the *Boswell* court discussed the *North* decision, in which a father sought to have a visitation order denying him overnight visitation with his children based on his homosexuality overturned, the *North* decision did not directly address the issue at hand in *Boswell*. *North*, 102 Md. App. 1, 648 A.2d 1025. The *North* court based its decision solely on the fact that the restriction imposed was illogical, not because a showing of actual harm to the children was required. *Id.* at 12-16, 648 A.2d at 1031-33 (stating that there was no reason to believe that Mr. North was more likely to expose the children to his lifestyle at night than during the afternoon, and that "[t]his, and this alone, is what convinces us that the court abused its discretion").

152. *Boswell*, 352 Md. at 237, 721 A.2d at 678.

153. *Id.*

which adultery had been improperly used against a parent by a trial court in deciding on custody or visitation.[154]

The *Boswell* court also relied on Maryland case law applying the best interests of the child standard to visitation disputes involving heterosexuals to extend the application of the same standard to disputes involving a homosexual parent.[155] In reviewing these cases, the court noted that "when a court does make a finding of actual or potential harm based on evidence and not presumption, visitation with the parent can be legitimately restricted or denied."[156] While these cases involved custody and visitation disputes, the *Boswell* court expressly recognized the extension of their reasoning to the *Boswell* case and its application of a common standard when it stated, "the actual harm . . . approach we outline today regarding visitation restrictions applies to both heterosexual and homosexual relationships."[157] The court's opinion thus solidified the notion that any sexual conduct of parents, homosexual or heterosexual, is only relevant to the extent it is proven harmful to a child's well-being.[158]

The court's reasoning with regard to visitation rights could apply equally to cases involving custody rights. The court acknowledged this when it stated, "[w]e also want to reiterate that the case law discussed in this opinion concerning custody determinations, and the principles governing such situations, are equally applicable to visitation proceedings."[159] The court's application of a broad standard to all family disputes, regardless of whether the dispute is over visitation or custody and regardless of whether the parent is homosexual or heterosexual, demonstrates that sexuality of a parent outside of marriage is not a presumptively negative factor in determining what is best for a child.

In solidifying the connection between the best interests of the child standard and the required showing of actual harm before restricting custody or visitation rights, the *Boswell* court also properly joined other jurisdictions in rejecting negative presumptions about a

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154. *Id.* at 225-27, 721 A.2d at 672-73. Specifically, the *Boswell* court cited to *Davis*, *Draper*, and *Swain*, and explained that in these cases trial courts had erred in awarding custody to the father of the children based on a presumption of unfitness due to the mother's adultery. *See id.*

155. *Id.* at 221, 721 A.2d at 670.

156. *Id.* at 227-28, 721 A.2d at 673.

157. *Id.* at 237, 721 A.2d at 678.

158. *See id.* at 237-38, 721 A.2d at 678 ("The only relevance that a parent's sexual conduct or lifestyle has in the context of a visitation proceeding of this type is where that conduct or lifestyle is clearly shown to be detrimental to the children's emotional and/or physical well-being.").

159. *Id.* at 236, 721 A.2d at 677.

homosexual person's fitness as a parent.[160] Courts from Alaska to New York have instructed trial judges to ignore the issue of sexuality in custody and visitation disputes unless actual harm to the children can be shown as a result of the presence of a homosexual parent or the parent's nonmarital partner.[161] In *Boswell*, the Court of Appeals of Maryland adopted the same broad approach, reflecting a trend of acceptance and tolerance with regard to nontraditional relationships and a recognition of their importance to children of divorce.

b. Instructing Trial Courts to Avoid Basing Decisions on Individual Biases.—To overcome the presence of individual trial court judges' biases in the decisionmaking process, the *Boswell* court emphasized that "before a trial court restricts the noncustodial parent's visitation, it must make specific factual findings based on sound evidence in the record."[162] The court's opinion ensures that stereotypical presumptions do not improperly guide judges in their determination of what is in the best interests of the child. By clarifying the standard and creating a nexus test, the court limited the discretion of trial court judges.[163] The nexus approach requires that there be "a clear relationship between a parent's homosexuality and harm to the child before custody is denied to the parent on the basis of that factor."[164] Actual harm must be shown as a result of contact with the nonmarital partner, in order to restrict custody or visitation.[165]

The *Boswell* court stated that "[t]he only relevance that a parent's sexual conduct or lifestyle has in the context of a visitation proceeding of this type is where that conduct or lifestyle is clearly shown to be detrimental to the children's emotional and/or physical wellbe-

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160. *See supra* Part 2.d (discussing custody and visitation cases involving homosexual parents from various states).

161. *See, e.g.*, S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (finding that the fact that the mother is a lesbian has no effect on her ability to raise her child); M.A.B. v. R.B., 510 N.Y.S.2d 960, 964 (N.Y. Sup. Ct. 1986) (noting that a mother's homosexuality in itself does not evidence any harm to her children); Conkel v. Conkel, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) (holding that a homosexual father could not be denied overnight visitation with his children because of his homosexuality).

162. *Boswell*, 352 Md. at 237, 721 A.2d at 678.

163. *See id.* (stating that "if a trial court relies on abstract presumptions, rather than their sound principles of law, an abuse of discretion may be found").

164. *See* Karen Markey, *An Overview of the Legal Challenges Faced By Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS. 721, 726-27 (1998) (examining courts' use of the nexus test in awarding custody and visitation rights to homosexual parents).

165. *See id.* at 727 (discussing *S.N.E. v. R.L.B.*, 699 P.2d 878 (Alaska 1985), in which the Supreme Court of Alaska applied the nexus test).

ing."[166] The Court of Appeals originally adopted the nexus test in *Davis*, rejecting use of the *per se* rule that presumed parental unfitness based on adulterous conduct.[167] Likewise, a similar presumption of unfitness based on a parent's homosexuality can no longer be maintained, as the Court of Appeals now requires a specific, direct connection between any showing of actual harm and contact with the nonmarital partner.[168] Therefore, the *Boswell* court upheld the Court of Special Appeals's decision to vacate the visitation prohibition "because the trial court made no factual findings that evidenced actual or likely future harm to Ryan or Amanda due to contact with Mr. Donathan and it also appeared to consider the factor of Mr. Boswell's nonmarital relationship to the exclusion of all others . . . ."[169] The trial court in *Boswell* ordered restricted visitation without a finding of harm to the children; instead, the court restricted visitation because it deemed Mr. Boswell's relationship with Mr. Donathan to be "inappropriat[e]."[170] The Court of Appeals, however, disapproved of the trial court's method of determination, noting that no key party in the case, including Ms. Boswell, had asked the trial court to restrict Mr. Boswell's visitation.[171] Instead, the trial court acted on its own initiative based on its own beliefs regarding Mr. Boswell's relationship with Mr. Donathan,[172] and by failing to show how Mr. Donathan's presence harmed either Ryan or Amanda, the court failed to apply the requirements of the nexus test.[173] In the future, Maryland courts must eliminate sexual prejudices from their determinations and strictly follow the best interests of the child and actual harm standards, coupled with the nexus test. Moreover, the requirement of strict factual findings limits a trial judge's ability to interject his or her own value based judgments and prejudices into the custody or visitation analysis.

5. Conclusion.—The best interests of the child and actual harm standard, coupled with the nexus approach, is now the applicable standard for all custody and visitation disputes in Maryland. The reliance in *Boswell* on both heterosexual custody and visitation cases in Maryland, as well as cases in other jurisdictions involving homosexual

166. 352 Md. at 237-38, 721 A.2d at 678.

167. Davis v. Davis, 280 Md. 119, 127, 372 A.2d 231, 235 (1977).

168. *See Boswell*, 352 Md. at 237-38, 721 A.2d at 678.

169. *Id.* at 239, 721 A.2d at 679.

170. Boswell v. Boswell, 118 Md. App. 1, 33, 701 A.2d 1153, 1168 (1997).

171. *See* 352 Md. at 238, 721 A.2d at 678.

172. *See id.* ("[T]he trial court acted on its own initiative, seemingly influenced by its own biases and belief that Mr. Boswell's [homosexual] relationship . . . was inappropriate.").

173. *See id.* at 239, 721 A.2d at 679.

and heterosexual parents seeking custody and visitation, demonstrates that trial courts in Maryland should not only apply the standard established in *Boswell* to visitation disputes involving a homosexual parent but should apply it to custody disputes as well. While *Boswell* dealt only with the request of Mr. Boswell, a homosexual father, seeking liberal visitation with his two children; in the future, the decision in *Boswell* should extend the best interests of the child and actual harm standard to custody decisions involving a homosexual parent. Thus, in both custody and visitation disputes, "the correct standard to be applied is the best interests of the child, with liberal visitation being restricted only upon a showing of actual or potential adverse impact to the child resulting from the contact with the non-marital partner."[174] Furthermore, trial judges must strictly apply this standard, and refrain from allowing individual biases to influence their decisions in disputes involving a heterosexual or homosexual parent seeking custody or visitation with his or her children.

HOPE D. MILLER

174. *Id.* at 240, 721 A.2d at 679.

XI. INSURANCE LAW

A. *Shifting Nonallocated Risks to the Insurer in Disability Insurance Cases*

In *Mutual Life Insurance Co. v. Insurance Commissioner*,[1] the Court of Appeals addressed for the first time whether an insurance company can refuse to pay a claim made under a disability insurance policy on the grounds that the claim arose from a condition that had manifested itself prior to the issuance of the insurance policy.[2] The insurance policy at issue contained a statutorily required incontestability clause[3] but also included a provision that precluded payment for claims arising from sicknesses that had manifested prior to the effective date of the policy.[4] The Court of Appeals held that the definition of *sickness* used in the insurance policy was inconsistent with the statutorily required incontestability clause.[5] In so holding, the court has incorrectly forced insurers to assume the risk of loss for conditions excluded from coverage by the terms of the insurance policies.

1. The Case.—In November 1985, Mary L. Holland (Holland) applied for disability insurance with the Mutual Life Insurance Company of New York (MONY).[6] As part of the application process, Holland denied having had any previous mental or nervous disorders within the past ten years.[7] Mutual Life Insurance Company of New York issued Holland a disability insurance policy that covered disabilities that manifested while the policy was in force.[8] Under the policy, disability was defined in terms of "the insured not being able to work 'because of injury or sickness.'"[9] The policy also included, however,

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1. 352 Md. 561, 723 A.2d 891 (1999).

2. *Id.* at 563, 723 A.2d at 892.

3. An incontestability clause is

> a clause in a life insurance or health insurance policy providing that after the policy has been in force for a given length of time . . . the insurer shall not be able to contest it as to statements contained in the application; and, in the case of health insurance, the provision also states that no claim shall be denied or reduced on the grounds that a condition not excluded by name at the time of issue existed prior to the effective date.

BLACK'S LAW DICTIONARY 766 (6th ed. 1990); *see also* note 10 and accompanying text (setting forth Maryland's statutorily required incontestability clause).

4. *See Mutual Life Ins. Co.*, 352 Md. at 562-64, 723 A.2d at 892-93.

5. *Id.* at 575-76, 723 A.2d at 898. The court additionally held that the Insurance Commissioner had the power to force the defendant insurance company to pay the claim. *Id.*

6. *See* Insurance Comm'r v. Mutual Life Ins. Co., 111 Md. App. 156, 160, 680 A.2d 584, 586 (1996), *aff'd, Mutual Life Ins. Co.*, 352 Md. 561, 723 A.2d 891.

7. *See id.*

8. *See id.*

9. *See id.* (footnote omitted).

an incontestability clause as required by Article 48A, Section 441 of the Maryland Annotated Code (Section 441).[10] The policy stated:

> After this policy has been in force for 2 years during your lifetime, we may not contest any statements in the application. (We will not count as part of the 2 years any period when you are disabled.) . . . . We may not reduce or turn down any claim for loss incurred [or] Disability [as defined in the policy] starting after two years from the Policy Date on the grounds that a disease or physical condition existed prior to the Policy Date, unless that disease or physical condition is excluded from coverage by name or specific condition.[11]

The policy also defined the term *sickness* as a "sickness or disease which first manifests itself while this Policy is in force,"[12] and the term injury as an "accidental bodily injury sustained while this Policy [is] in force."[13]

In June 1989, Holland filed a claim for disability based upon a diagnosis of acute and chronic anxiety with panic attacks.[14] In October 1991, MONY denied Holland's claim on the grounds that the condition had manifested itself prior to the issuance of the policy and therefore fell outside of the policy's definition of *sickness*.[15] Both parties stipulated that the sickness that caused Holland's disability did in

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10. *See id.* at 586-87. Section 441 states:

> There shall be a provision as follows: "Time Limits on certain defenses: (1) After two years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period . . . ." (2) No claim for loss incurred or disability (as defined in the policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

MD. ANN. CODE art. 48A, § 441 (1994).

11. *See Mutual Life Ins. Co.*, 111 Md. App. at 161, 680 A.2d at 587 (alteration in original) (footnote omitted).

12. *Id.* at 160-61, 680 A.2d at 587 (internal quotation marks omitted).

13. *Id.* at 160 n.3, 680 A.2d at 586 n.3 (alteration in original) (internal quotation marks omitted).

14. *See id.* at 162, 680 A.2d at 587.

15. *See id.* The court noted that Ms. Holland had experienced symptoms of her condition as early as four months prior to her application for insurance. *Id.* at 163 n.9, 680 A.2d at 588 n.9.

fact manifest itself prior to the inception date of the insurance policy.[16]

Holland filed a complaint with the Maryland Insurance Administration (MIA), which subsequently ruled in her favor.[17] An Associate Commissioner for MIA ordered MONY to refrain from denying the claim on the grounds that the disability had manifested itself prior to the date of the policy, and to pay Holland's claim.[18] The Commissioner reasoned that the language of Section 441 bars insurers from denying claims based on pre-existing conditions regardless of whether the conditions have or have not manifested themselves.[19] MONY sought review of the Associate Commissioner's decision before the Insurance Commissioner.[20] The Insurance Commissioner affirmed the ruling of the Associate Commissioner and issued an order requiring MONY to pay Holland "all benefits due under the policy."[21] The Insurance Commissioner held that under article 48A, section 441(2) of the Maryland Annotated Code "incontestability extends to a pre-existing condition regardless of whether the condition manifested itself prior to the policy's effective date."[22] The Commissioner further stated that MONY was attempting to elude the common sense result of the incontestability clause statute by defining *sickness* to include only ailments that manifest themselves after the policy was issued.[23]

MONY appealed the Commissioner's decision to the Circuit Court for Baltimore City.[24] The circuit court affirmed the Commissioner's interpretation of the statute and, in addition, held that the incontestability provision prohibited MONY from disputing the

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16. *See id.* at 162-63, 680 A.2d at 587-88. The parties also stipulated that Ms. Holland was unaware that the condition had manifested at the time she applied for the policy. *Mutual Life Ins. Co.*, 352 Md. at 565, 723 A.2d at 893.

17. *See Mutual Life Ins. Co.*, 352 Md. at 565, 723 A.2d at 893.

18. *See id.* at 565-66, 723 A.2d at 893.

19. *See id.* at 566, 723 A.2d at 893. The Associate Commissioner also found that MONY's denial of the claim violated the penalty provisions contained in sections 55(2)(i), 55(2)(iv), and 230A(c)(2) of Article 48A. *See id.* Section 55(2)(i) gives the Insurance Commissioner the authority to take action against an insurer that has violated any section of the Insurance Article. MD. ANN. CODE art. 48A, § 55(2)(i) (1994). Section 55(2)(iv) empowers the Insurance Commissioner to take action against an insurer that has, without just cause, withheld or delayed payment from a claimant. *Id.* § 55(s)(iv) (1994). Section 230A(c)(2) prohibits insurers from refusing to pay a claim for an arbitrary or capricious reason. *Id.* § 230A(c)(2) (1994).

20. *See Mutual Life Ins. Co.*, 352 Md. at 566, 723 A.2d at 893.

21. *See id.* (internal quotation marks omitted).

22. *Id.*

23. *See id.*

24. *Id.* at 567, 723 A.2d at 894.

claim.[25] The court refused to accept MONY's invitation to distinguish between nonmanifested pre-existing conditions and manifested pre-existing conditions.[26] The court found that allowing for such a distinction would cause "insurers . . . to search any and all records regarding an insured's appointments with physicians for some hint of a manifestation prior to the effective date of the policy."[27] The circuit court, however, reversed the Insurance Commissioner's order that MONY pay Holland disability benefits.[28] The circuit court held that because there were no technical violations of the insurance code, the penalty provisions of section 55A of the code were not applicable.[29] The court reasoned that MONY's interpretation of section 441 was not unreasonable in light of other interpretations of similar statutes in courts of similar jurisdiction.[30]

Both parties appealed to the Court of Special Appeals.[31] The Court of Special Appeals agreed with the circuit court's interpretation of section 441 but reversed the circuit court's ruling regarding MONY's obligation to pay Holland's claim.[32] The court considered decisions from jurisdictions that, when interpreting similar incontestability clauses, recognized the "exist/manifest" distinction that allows the insurer to exclude pre-manifesting conditions from coverage.[33] The court, however, declined to follow that line of cases.[34] Instead, the court adopted the minority rule,[35] holding that the policy's definition of *sickness* was in contradiction with the incontestability provision of the policy.[36] The court reasoned that allowing such a definition of *sickness* would be contrary to the ordinary meaning of the incontest-

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25. Insurance Comm'r v. Mutual Life Ins. Co., 111 Md. App. 156, 168, 680 A.2d 584, 590 (1996), *aff'd, Mutual Life Ins. Co.*, 352 Md. 561, 723 A.2d 891.

26. *See id.*

27. *Id.* at 168, 680 A.2d at 590 (internal quotation marks omitted) (quoting the memorandum opinion of the Circuit Court for Baltimore City).

28. *Id.* at 169, 680 A.2d at 590.

29. *Id.* at 169, 680 A.2d at 591 (noting that MONY's policy had previously been filed with and approved by MIA prior to MONY's use of the policy in Maryland).

30. *See id.*

31. *Id.* at 158, 680 A.2d at 585-86.

32. *See id.* at 159, 680 A.2d at 586.

33. *Id.* at 176-78, 680 A.2d at 594-95.

34. *Id.* at 184, 680 A.2d at 595.

35. *Id.* ("We find the reasoning set forth by . . . [those courts who reject the exist/manifest distinction] persuasive and consistent with Maryland's well-settled rules concerning the continuation of insurance policies and statutes.").

36. *Id.* at 188, 680 A.2d at 600.

ability clause,[37] and would allow insurers to subvert the legislative intent for requiring incontestability clauses.[38]

The Court of Special Appeals further held that MONY was required to pay Holland's claim because of a stipulation entered into by the parties at the administrative proceeding.[39] The court interpreted the stipulation as requiring MONY to pay the claim in the event the Insurance Commissioner's interpretation of Section 441 was upheld.[40] The court did not address MONY's argument that payment could not be ordered because no actual violations of section 441 were present.[41]

The Court of Appeals granted certiorari to examine two issues.[42] The first issue was whether an insurer could deny a claim for disability based upon the illness having first manifested itself prior to the policy date, despite the insurance policy containing the statutorily required incontestability clause.[43] The second issue was whether the Insurance Commissioner had the authority to order MONY to make payment of the claim.[44]

2. Legal Background.—

a. Early Development of the Incontestability Clause.—The first known incontestability provision was introduced in 1848.[45] The provision was most likely a marketing tool created in response to public distrust of the insurance industry after a series of cases in which insur-

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37. *Id.* at 186, 680 A.2d at 600.

38. *See id.* at 187-88, 680 A.2d at 600 ("[W]e are satisfied that the legislature did not intend that an 'exist/manifest' distinction, enabling an insurer to institute litigation concerning coverage of pre-existing conditions after the expiration of the two years contestability period, be read into the statute.").

39. *See id.* at 191, 680 A.2d at 602. The stipulation provided:

> In the event the Insurance Commissioner affirms the December 14, 1993, Notice and Order, MONY agrees not to deny payment for the claim at issue on the ground that the Insured's condition of Acute and Chronic Anxiety with Panic Attacks first manifested itself prior to the effective date of the Policy, and, the MIA agrees not to hold that MONY's initial declination was a § 230A(c)(2) violation. This agreement, however, will in no way impede either Party's right to an appeal nor MONY's right to request a Stay from the court on the disability payments pending the outcome of the appeal.

Id. (internal quotation marks omitted).

40. *Id.* at 192, 680 A.2d at 602.

41. *See id.* at 193, 680 A.2d at 602.

42. *Mutual Life Ins. Co.*, 352 Md. at 567-68, 723 A.2d at 894.

43. *See id.* at 567-68, 723 A.2d at 894.

44. *See id.* at 568, 723 A.2d at 894.

45. *See* David G. Newkirk, *An Economic Analysis of the First Manifest Doctrine:* Paul Revere Life Insurance Co. v. Haas, 76 NEB. L. REV. 819, 825 (1997) (citing 1 BERTRAM HARNETT & IRVING L. LESSNICK, THE LAW OF LIFE AND HEALTH INSURANCE 507[3], at 5-207 (1997)).

ance companies relied on breach of warranty as a defense.[46] Insurance companies began voluntarily using incontestability clauses in the United States as early as 1864,[47] and less than ten years later, the Ohio legislature passed the first legislation rendering insurance policies incontestable after three premium payments had been made.[48] Under the Ohio statute, however, insurance companies were allowed to deny claims for reasons of fraud or misstatements of age.[49]

By 1905, widespread charges of corruption and fraud in the insurance industry, combined with exposés in two popular journals, spurred the creation of a probe in New York known as the Armstrong Commission.[50] Following an investigation, the Armstrong Commission urged the New York legislature to pass wide ranging reform legislation aimed at curbing the alleged fraud within the insurance community.[51] The Armstrong Commission, and similar groups, also developed standard insurance policy language, including provisions that specifically required incontestability clauses.[52] These standard provisions were quickly adopted by numerous jurisdictions anxious to join the reform efforts.[53]

b. The Incontestability Statute in Maryland.—The Maryland Legislature required incontestability clauses to be included in certain types of insurance policies as early as 1937.[54] In 1951, the Maryland General Assembly enacted the Uniform Individual Accident and Sickness Policy Provisions Law (Uniform Provisions Law), which had been recommended by the National Association of Insurance Commission-

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46. *See id.* at 825-26; *see also* Eric K. Fosaaen, Note, *AIDS and the Incontestability Clause*, 66 N.D. L. Rev. 267, 268 (1990) (noting that the incontestability clause was first offered "because of public distrust of insurers and their promises to pay benefits in the future" (citing J. GREIDER & W. BEADLES, LAW AND THE LIFE INSURANCE CONTRACT 237 (1968)).

47. *See* Fosaaen, *supra* note 46, at 268 (noting that the first incontestability clause used in the United States was by the Manhattan Life Insurance Company in 1864).

48. *See id.* (citing 1872 OHIO LAWS, at 160 (codified as OHIO REVISED STATUTES OF 1880, § 5779 (LANING 1907)).

49. *See id.* at 268 n.13 (noting that the first incontestability statute barred the raising of all defenses except fraud and misstatements of age and did not permit insurers to preserve other defenses in the policy).

50. *See* H. ROGER GRANT, INSURANCE REFORM: CONSUMER ACTION IN THE PROGRESSIVE ERA 28-29 (1979) (referring to articles in *Everybody's Magazine*, *Era Magazine*, and the *New York World*); *see also* Newkirk, *supra* note 45, at 826.

51. *See* Grant, *supra* note 50, at 29.

52. *See* Newkirk, *supra* note 45, at 826.

53. *See* JANICE E. GREIDER, LIFE AND HEALTH INSURANCE HANDBOOK: BASIC LEGAL CONCEPTS 191-95 (Davis W. Gregg ed., 2d ed. 1964).

54. *See Mutual Life Ins. Co.*, 352 Md. at 569, 723 A.2d at 895.

ers a year earlier.[55] The Uniform Provisions Law contained incontestability provisions that were later codified in the Maryland Annotated Code.[56] In 1997 this statute became section 15-208 of the Insurance Article of Maryland.[57] Section 15-208(a) requires that all health insurance policies issued in Maryland contain a provision that states that the insurer can not deny a claim based upon misstatements made by the insured in the application process after the expiration of a two-year period.[58] The provision must also state that no claim may be denied two years after the date of the policy on the grounds that the condition causing the claim existed prior to the inception of the policy.[59] Subsection (c) allows the insurer to substitute the following language for the clause mandated by 15-208(a)(1): "After this policy has been in force for a period of two years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application."[60]

Prior to *Mutual Life*, the Court of Appeals had not addressed whether the incontestability provision of section 441[61] recognized, or would permit, a distinction between pre-existing conditions and conditions that had manifested prior to the policy date.[62] However, numerous other courts of similar jurisdiction have addressed the scope of incontestability provisions of insurance policies.

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55. *See* 1951 Md. Laws Ch. 687 (codified as amended at MD. ANN. CODE art. 48A, §§ 151-154 (1951)) (repealing MD. ANN. CODE art. 48A, § 106A-D (Supp. 1947)).

56. *See* MD. ANN. CODE art. 48A (1957).

57. *See* MD. ANN. CODE, INS. § 15-208 (1997).

58. *Id.* § 15-208(a)(1). Section 15-208(a)(1) states:

> After two years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period.

Id.

59. *Id.* § 15-208(a)(2). Section 15-208(a)(2) states:

> No claim for loss incurred or disability (as defined in the policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

Id.

60. *Id.* § 15-208(c)(2).

61. For clarity purposes, section 15-208 will be referred to under its previous name, section 441. *See supra* note 57 and accompanying text.

62. *See generally Mutual Life Ins. Co.*, 352 Md. at 571, 723 A.2d at 895-96.

c. Cases Dealing with the Incontestability Clause.—In *National Life & Accident Insurance Co. v. Mixon*,[63] the Supreme Court of Alabama viewed an insurance policy as "a whole" and concluded that the incontestability clause could coexist with a provision limiting coverage.[64] The *Mixon* insurance policy contained an incontestability provision and a clause requiring the injury to be "caused solely by disease or injuries contracted or sustained after the Date of Issue."[65] In rendering its decision, the Supreme Court of Alabama agreed with Professor Williston that "[a]n incontestable clause forecloses contests of the validity of the policy, as intended, but does prevent the insurer from defending on the ground that the loss incurred was expressly excluded from or clearly never covered under the terms of the policy."[66] The court also stated that "an incontestable clause does not relieve the claimant of the duty to establish his right of recovery in the first instance under the specific language of the policy, as where he must show that the insured's illness arose after the attachment of the policy."[67]

The court concluded its opinion by stating that there was no conflict between the incontestability clause and the pre-existing disease exclusion clause.[68] The court noted that the insurer was not seeking to deny the validity of the policy, which would have been prohibited under the incontestability statute, but only to exclude injuries suffered as a result of diseases excluded from coverage by means of the pre-existing clause.[69] The *Mixon* court cited twenty-six cases from sixteen different jurisdictions that supported the proposition that incontestability clauses and clauses that exempt recovery for sicknesses stemming from pre-existing diseases can coexist in the same insurance policy.[70]

In *Paul Revere Life Insurance Co. v. Haas*,[71] the Supreme Court of New Jersey addressed an insurance policy that contained both an incontestability clause and a provision limiting coverage to injuries sustained as a result of conditions that first manifested themselves while

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63. 282 So. 2d 308 (Ala. 1973).

64. *See id.* at 316.

65. *Id.* at 310.

66. *Id.* at 315 (quoting S. WILLISTON, WILLISTON ON CONTRACTS § 912 (3d ed. 1963)).

67. *Id.* at 316 (quoting G. COUCH, COUCH ON INSURANCE § 72:65 (2d ed. 1968)).

68. *Id.*

69. *See id.* (describing the operation of the two clauses as the "latter [pre-existing clause] constitutes an exception to the former [incontestability] . . . clause").

70. *See Mixon*, 282 So. 2d at 314 (listing numerous cases that allow both clauses in insurance policies).

71. 644 A.2d 1098 (N.J. Sup. Ct. 1994).

the policy was in effect.[72] The court stated that the purpose of the statutorily required incontestability clause was to protect innocent insureds that were unaware of their diseases.[73] However, the court held that the insurer would not be precluded from limiting the scope of coverage to disabilities that first manifest while the policy is in effect.[74] The court also noted that relevant to its decision was the "principle that '[o]ne cannot obtain insurance for a risk that the insured knows has already transpired.'"[75] The *Haas* court allowed the insurer to deny the claim of an insured that had intentionally concealed a manifested pre-existing condition.[76]

3. The Court's Reasoning.—In *Mutual Life,* the Court of Appeals unanimously held that the statutorily required incontestability clauses in insurance policies apply to pre-policy conditions regardless of whether the condition "manifests" before the policy takes effect.[77] The Court of Appeals began its analysis by identifying the purposes behind incontestability statutes.[78] The court stated that public pressure and discontentment with the insurance industry caused state legislatures to enact laws forcing insurance companies to include incontestability provisions in their policies.[79] The court further noted that

> [t]he reason such clauses were statutorily required "lies in the early greed and ruthlessness of the insurers. All too often, instead of paying the beneficiary, they resisted liability stubbornly on the basis of some misstatement made by the insured at the time of applying for the policy, as to which they carefully refrained from comment until the insured had died and was unable to testify on his own behalf."[80]

The court then provided a brief history of Maryland's incontestability clause and noted that following the adoption of Maryland's incontestability statute, the annual report of the Maryland Insurance

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72. *See id.* at 1104.

73. *Id.* at 1108.

74. *Id.* at 1107.

75. *Id.* at 1108 (quoting Township of Gloucester v. Maryland Cas. Co., 668 F. Supp. 394, 403 (D.N.J. 1987)).

76. *Id.*

77. *See Mutual Life Ins. Co.*, 352 Md. at 572, 723 A.2d at 896.

78. *See id.* at 568-71, 723 A.2d at 894-95 (describing the evolution of the modern day incontestability clause).

79. *Id.* at 568, 723 A.2d at 894.

80. *Id.* (internal quotation marks omitted) (quoting Fischer v. Massachusetts Cas. Ins. Co., 458 F. Supp. 939, 944 n.1 (S.D.N.Y. 1978) (quoting 7 WILLISTON ON CONTRACTS § 912, at 394 (3d ed. 1963))).

Commissioner stated that the new law "provides new and substantially increased protection to [insurance] policyholders."[81]

The court explained that the legislative intent in requiring incontestability clauses was to protect the insured and their beneficiaries.[82] Upon examination of prior case law, the court noted that a further purpose of the incontestability clause was to put "a checkmate upon litigation and to prevent an expensive resort to the courts for resolution."[83] The court suggested that the insured is not in a good position to "wage battle" with the insurance company regarding statements that were made years earlier.[84] The court acknowledged that such clauses were created for the benefit of the insured, but also insisted that the clauses allow the insurer a reasonable opportunity to investigate the statements made by the applicant.[85]

The Court of Appeals next turned its analysis to the language of the Maryland incontestability statute.[86] The court stated that the manifest/pre-exist distinction advanced by MONY "is flatly inconsistent with the statutory language set forth in Art. 48A, § 441(2)."[87] The court noted that the statute precludes denial of any claim after two years from the policy's inception date, on the grounds that the illness or condition existed prior to the date of coverage, and that any condition that manifests itself prior to the date of the policy clearly exists prior to the policy.[88] Adopting language from an earlier decision by the United States Court of Appeals for the Seventh Circuit, the court asserted that the term *exist* "refers broadly to a state of being, without reservation as to other qualities, including manifestation."[89] The court also relied upon the reasoning of the Appellate Division of the New York Supreme Court for the proposition that whether or not an illness has manifested itself, the fact that the condition exists prior to

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81. *Id.* at 569, 723 A.2d at 895 (internal quotation marks omitted).

82. *Id.*

83. *Id.* at 570, 723 A.2d at 895 (internal quotation marks omitted) (quoting Equitable Life Assurance v. Jalowsky, 306 Md. 257, 262-63, 508 A.2d 137, 140 (1986)).

84. *See id.* (quoting JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE WITH FORMS § 311, at 305-06, 321 (1981)).

85. *See id.* (citing Massachusetts Cas. Ins. Co. v. Forman, 516 F.2d 425, 428 (5th Cir. 1975)). The court also noted that "[t]he . . . [incontestability clause] encourages the insured to have confidence that after the period passes they are assured of receiving benefits upon the happening of a covered loss." *Id.* (internal quotation marks omitted) (quoting 18 COUCH ON INSURANCE 2d § 72:16, at 293-94 (1983)).

86. *See id.* at 571-76, 723 A.2d at 896-98.

87. *Id.* at 572, 723 A.2d at 896.

88. *See id.*

89. *See Mutual Life Ins. Co.*, 352 Md. at 572, 723 A.2d at 896 (internal quotation marks omitted) (quoting Equitable Life Assurance Soc'y v. Bell, 27 F.3d 1274, 1281 (7th Cir. 1994)).

the inception of the insurance policy brings into play the incontestability provision of the policy.[90]

The *Mutual Life* court, however, did recognize one exception to the operation of the incontestability clause of section 441.[91] The Court of Appeals stated that insurance companies are free to exclude certain conditions from coverage by name or by specific description.[92] As an example, the court noted the gastro-intestinal exception contained in Holland's insurance policy.[93] The court stated, however, that Holland's disabling condition did not fall within the statutorily allowed exceptions of section 441 because the condition was not excluded by name or by specific description.[94]

The court next explained that an exception to section 441 for pre-existing conditions, which have not manifested prior to the effective date of the policy, would circumvent the very reason for requiring incontestability clauses—to prevent expensive and time-consuming litigation.[95] The Court of Appeals asserted that deciding whether a particular symptom is a manifestation of a later diagnosed disease is a very difficult question that would likely lead to "many additional administrative and judicial proceedings."[96] The court further maintained that allowing such an exception would allow an insurance company to contest every possible illness on the grounds that the illness had manifested prior to the date of the policy.[97]

The court also rejected MONY's argument that section 441 did not prohibit an insurer from defining the term *sickness* in the policy as it wished, and as such, *sickness* could be defined to exclude pre-existing conditions manifesting prior to the issuance of the policy.[98] The court characterized this argument as allowing the statutorily re-

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90. *See id.* (quoting Monarch Life Ins. Co. v. Brown, 512 N.Y.S.2d 99, 103 (N.Y. App. Div. 1987)). The *Monarch Life* court further stated that there was no indication that the legislature wished any definition to be used for the term *exist* other than its broader plain meaning. *See Monarch Life Ins. Co.*, 512 N.Y.S.2d at 102.

91. *See* 352 Md. at 573, 723 A.2d at 896-97.

92. *See id.*

93. *See id.*, 723 A.2d at 896 (noting that the parties agreed that the gastro-intestinal exception did not cover the condition from which Ms. Holland is now claiming injury).

94. *See id.*

95. *Id.* at 573, 723 A.2d at 897 (stating that such an exception "cannot be squared with the purpose of incontestability clauses . . . [to] 'put[ ] a checkmate upon litigation' and 'prevent[ing], after the lapse of a certain period of time, an expensive resort to the courts.'" (quoting Equitable Life Ins. v. Jalowsky, 306 Md. 257, 262, 508 A.2d 137, 140 (1986) (third and fourth alterations in original).

96. *See id.*

97. *See id.* (quoting Monarch Life Ins. Co. v. Brown, 512 N.Y.S.2d 99, 102-03 (N.Y. App. Div. 1987)).

98. *See id.* at 574-75, 723 A.2d at 897-98.

quired incontestability clause to be completely circumvented by a "skillful and abnormal definition of the key coverage terms in the policy."[99]

The court also asserted that adopting this position would violate the long-standing principle that "if [an] insurance policy contains a limitation which is inconsistent with . . . [the Insurance Code] . . . , such limitation is unenforceable."[100] The court stated that an insurance company could not avoid this principle because "the policy's limitation on coverage is couched in terms of a definition."[101] Finally, the court noted that this argument, which was "based on a disingenuous definition of the term 'sickness,'" had been previously rejected by a number of other courts.[102]

The court concluded by discussing MONY's argument that there was no technical violation of the insurance code and therefore the Insurance Commissioner lacked the authority to order MONY to pay Holland's claim.[103] The court, in discussing the enforcement and penalty provisions of the insurance code, noted that article 48A, section 24(2) confers not only expressly granted powers and authority, but also grants authority "reasonably implied from the provisions of . . . [the] article."[104] The court further stated that sections 55(2)(iv) and 55(2)(i) authorize the Insurance Commissioner to revoke the insurer's certificate of authority if the insurer violates any provision of the article or unreasonably refuses or delays payment due an insured without just cause.[105] The court continued the analysis by noting that, to guarantee that injured parties are compensated for damage suf-

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99. *Id.* at 574, 723 A.2d at 897. The court further noted that if this argument were valid, with the right definition, insurance companies would be able to avoid all pre-existing conditions, rendering the incontestability clause wholly superfluous. *See id.*

100. *Id.* (internal quotation marks omitted) (first, third, and fourth alterations in original) (quoting West Am. Ins. Co. v. Popa, 352 Md. 455, 465 n. 2, 723 A.2d 1, 6 n.2 (1998) (quoting Forbes v. Harleysville Mut., 322 Md. 689, 702, 589 A.2d 944, 950 (1991))) (citing Enterprise v. Allstate, 341 Md. 541, 550, 671 A.2d 509, 514 (1996), Gable v. Colonial Ins. Co., 313 Md. 701, 703, 548 A.2d 135, 136 (1988), Lee v. Wheeler, 310 Md. 233, 238, 528 A.2d 912, 915 (1987), Reese v. State Farm Mut. Auto. Ins., 285 Md. 548, 552 n. 1, 403 A.2d 1229, 1231 n.1 (1979)).

101. *Id.* at 575, 723 A.2d at 897 (citing West Am. Ins. Co. v. Popa, 352 Md. 455, 465, 723 A.2d 1, 6 (1998)).

102. *See id.*, 723 A.2d at 897-98 (citing Equitable Life Assurance Soc'y v. Bell, 27 F.3d 1274 (7th Cir. 1994), Estate of Doe v. Paul Revere Ins. Group, 948 P.2d 1103 (Haw. Ct. App. 1997), Provident Life and Accident Ins. Co. v. Altman, 795 F. Supp. 216 (E.D. Mich. 1992), Wischmeyer v. Paul Revere Life Ins. Co., 725 F. Supp. 995 (S.D. Ind. 1989)).

103. *See id.* at 577, 723 A.2d 898.

104. *Id.* at 576, 723 A.2d at 898 (internal quotation marks omitted) (quoting MD. ANN. CODE, art. 48A, § 24(2) (1957)).

105. *See id.* (quoting MD. ANN. CODE art. 48A, §§ 55(2)(i), 55(2)(iv)).

fered at the hands of the insurer, section 55A gives the Insurance Commissioner the authority to impose monetary penalties in lieu of revoking or suspending the insurer's certificate.[106]

The court then discussed section 230A, which makes it a violation of the law to refuse "to pay a claim for an arbitrary or capricious reason[107] . . . [, fail] to make a good faith attempt promptly, fairly, or equitably to settle claims for which liability has become reasonably clear[108] . . . [, or to fail to promptly provide] a reasonable explanation for the basis for denial of a claim . . . ."[109] The court explained that the referenced statutory provisions authorize the Insurance Commissioner to order an insurer to pay a claim whenever the insurance policy or the law has been violated.[110] The court noted that MONY, rather than refuting this position, argued that the definition of *sickness* in the policy did not violate the code.[111] The court disputed the contention that section 441 was not violated because MONY included the incontestability clause in Holland's insurance policy.[112]

The Court of Appeals also disposed of MONY's argument that section 230(A)(c)(2) was not violated because the refusal to pay Holland's claim was neither arbitrary nor capricious.[113] The court stated that MONY's argument "border[ed] on the frivolous."[114] The court concluded that when the legislature required a particular clause to be inserted into insurance policies, it intended for there to be adherence to the clause so as to set a standard of minimum coverage to which beneficiaries are entitled.[115]

4. Analysis.—In *Mutual Life Insurance Co. v. Insurance Commissioner*, the Court of Appeals held that insurers could not use an "exist/manifest" distinction to exclude pre-existing conditions from coverage, contrary to the policy's statutorily required incontestability

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106. *Id.*

107. *Id.* (internal quotation marks omitted) (quoting MD. ANN. CODE art. 48A, § 230(c)(2)).

108. *Id.* (internal quotation marks omitted) (quoting MD. ANN. CODE art. 48A, § 230A(d)(6)).

109. *Id.* (internal quotation marks omitted) (quoting MD. ANN. CODE art. 48A, § 230(d)(14)).

110. *Id.* (discussing the penalty provision of the Insurance Code).

111. *Id.* at 577, 723 A.2d at 898-99.

112. *Id.* at 577-78, 723 A.2d at 899 (stating that such an argument was without merit).

113. *Id.* at 577, 723 A.2d at 899. MONY argued that because there was no section 441 violation, sections 55(2)(i), 55(2)(iv), and 55(A) could not have been violated because they are merely enforcement provisions that take effect after the violation of another provision. *Id.*

114. *Id.*

115. *See id.* at 577-78, 723 A.2d at 899.

clause.[116] The court's holding, however, has inappropriately shifted the assumption of risk for certain conditions to insurers, while giving the insured an unwarranted additional protection from risks excluded from their insurance policies.

A person usually purchases disability insurance policies so that he or she can transfer the risk of loss from a catastrophic injury to another party.[117] The insurer accepts payments from the insured in exchange for a contractual guarantee that the insured will be entitled to certain benefits if he or she becomes disabled.[118] In such situations, it would appear that the most cost-effective option for insurance companies would be to accept payments from the insured and then find some reason to escape liability for the benefits. In fact, early nineteenth-century insurance companies often engaged in this procedure.[119] In response, many state legislatures passed laws requiring insurance companies to include incontestability provisions in their policies.[120]

However, legislatures have expressly allowed insurers to define the particular risks against which they are insuring.[121] For example, it would not be sensical for an insurance company to issue an insurance policy against loss from a heart attack to a person that had recently undergone triple or quadruple by-pass surgery. Adhering to this general principle, the Maryland General Assembly has, in section 441, expressly instructed the insurer to define the disability against which it is insuring.[122]

Contrary to this principle, the Court of Appeals decision in *Mutual Life* effectively broadened the scope of numerous insurance poli-

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116. *Id.* at 575-76, 723 A.2d at 898.

117. *See generally* HERBERT S. DENENBERG ET AL., RISK AND INSURANCE (2d ed. 1974).

118. *See id.* at 301-15.

119. *See* Fosaaen, *supra* note 46, at 268 n.10 (noting that it was common during this period for insurance companies to refuse to pay benefits or offer to settle for substantially less than the policy value based on "minor misrepresentations in the application" (citing H. GRANT, INSURANCE REFORM: CONSUMER ACTION IN THE PROGRESSIVE ERA 22-27 (1979)).

120. *See supra* notes 51-55 and accompanying text (describing attempts by state legislatures to limit the ability of insurance companies to deny policy claims).

121. *See* Robert R. Googins, *Fraud and the Incontestable Clause: A Modest Proposal for Change*, 2 CONN. INS. L.J. 51, 58 (1996) (noting that the Supreme Court of New Jersey in *Paul Revere Life Insurance Co. v. Haas*, 644 A.2d 1098 (N.J. Sup. Ct. 1994), recognized that the classic view was that the incontestability provision only dealt with challenges to the validity of the contract and did not prohibit the defense that the risk was outside of the coverage of the policy; and additionally discussing justifications for the classic view); *see also* Fosaaen, *supra* note 46, at 281-83 (describing cases that took the position that the risks assumed by an insurance policy are unaffected by an incontestability clause).

122. MD. ANN CODE art. 48A, § 441(2) (1994) (addressing losses and disabilities "as [those] defined in the policy").

cies and superseded the intent of the parties when entering into the insurance contract. Holland's insurance policy clearly defined disability as a "sickness or disease which first manifests itself while this Policy is in force."[123] By forcing MONY to pay Holland's claim, the court has inappropriately broadened the scope of Holland's policy to include risks originally not assumed by the insurer.

a. Both Clauses of the Insurance Policy are Compatible.—The court argues for a "plain language" approach when interpreting the incontestability provision of an insurance policy,[124] but refuses to apply the same approach when interpreting the provision that defines disability. In *Pacific Indemnity Co. v. Interstate Fire & Casualty Co.*,[125] the Court of Appeals stated that "[t]o determine the intention of the parties to the insurance contract, which is the point of the whole analysis, we construe the instrument as a whole."[126] The court further stated that in so doing "we accord words their ordinary and accepted meanings."[127] Yet in *Mutual Life*, the court ignored the clear definition of *sickness* provided in the policy, which limited recovery to a "sickness or disease which first manifests itself while . . . [the policy] is in force."[128] Also, in *Cheney v. Bell National Life*,[129] the Court of Appeals, when addressing competing interpretations of an insurance contract, stated that the correct rule is "the rule applicable to the construction of contracts generally, . . . that the intention of the parties is to be ascertained if reasonably possible from the policy as a whole."[130] By disallowing the policy's definition of the scope of coverage, the court in *Mutual Life* effectively altered the nature of the policy and based its decision on only a fraction of the actual policy.

The court decided not to give effect to the plain meaning of the term *sickness* because of its belief that the incontestability provision of the policy was incompatible with the definition of *sickness* used in the

123. *See Mutual Life Ins. Co.*, 352 Md. at 565, 723 A.2d at 892-93.

124. *See id.* at 572 A.2d at 896 (asserting that the "exist/manifest" discretion by MONY was "flatly inconsistent with the statutory language" of section 441).

125. 302 Md. 383, 488 A.2d 486 (1985).

126. *Id.* at 388-89, 488 A.2d at 488.

127. *Id.*

128. *Mutual Life Ins. Co.*, 392 at 565, 723 A.2d at 893 (internal quotation marks omitted). Holland's insurance policy also defined disability as "either a Total Disability or a Partial Disability, *provided that in either case the Disability starts while this Policy is in force.*" Brief of Petitioner at 6, Mutual Life Ins. Co. v. Insurance Comm'r, 352 Md. 561, 723 A.2d 891 (1999) (No. 103)).

129. 315 Md. 761, 556 A.2d 1135 (1989).

130. *Id.* at 766-67, 556 A.2d at 1138.

policy.[131] However, as the Court of Special Appeals acknowledged, many courts that have considered this issue have recognized that an insurer has the ability to preclude pre-manifesting conditions from policies, while also including statutorily required incontestability provisions.[132] The courts, adhering to the "interpret as a whole" principle, have found that such a definition of the term *sickness* can work in conjunction with an incontestability clause.

In the *Mutual Life* case, MONY was not seeking to deny the existence of the insurance policy, only to except from coverage those injuries resulting from conditions that had manifested prior to the inception of the policy.[133] However, the court chose to interpret the two provisions in such a manner as to force their contradiction.

The holding in this case has given protection to the non-innocent insured who would have surely been denied recovery under the *Mixon* or *Haas* courts.[134] The Court of Appeals has given protection to insureds that conceal conditions they may have, regardless of the severity or duration of the condition. Additionally, the court has afforded Holland protection for a risk that transpired over four years before her claim for disability.[135] By doing so, the court's decision clearly contradicts the principles enunciated by the *Haas* court and creates a windfall for any lucky insurance policy holder in Maryland that can simply wait out the incontestability period.[136] The *Mutual Life* holding

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131. *See supra* notes 82-85 and accompanying text (discussing the court's belief that the purpose behind the incontestability statute would be contravened by allowing the policy's definition of *sickness* to stand).

132. *See* Insurance Comm'r v. Mutual Life Ins. Co., 111 Md. App. 156, 176, 680 A.2d 584, 594 (1996), *aff'd, Mutual Life Ins. Co.*, 352 Md. 561, 723 A.2d 891 (citing cases which support the premise that both clauses can coexist in the same policy, including Button v. Connecticut Gen. Life Ins. Co., 847 F.2d 584, 588-89 (9th Cir.), *cert. denied*, 488 U.S. 909 (1988); Keaten v. Paul Revere Ins. Co., 648 F.2d 299, 301-03 (5th Cir. 1981); Allen v. Aetna Life Ins. Co., 563 F.2d 1240, 1241-42 (5th Cir. 1971); Massachusetts Cas. Ins. Co. v. Forman, 516 F.2d 425, 428-30 (5th Cir. 1975), *cert. denied*, 424 U.S. 914 (1976); Paul Revere Life Ins. Co. v. Haas, 137 N.J. 190, 644 A.2d 1098, 1104-08 (1994); Mutual Life Ins. Co. of New York v. Hayden, 386 N.Y.S.2d 978, 981-82 (N.Y. Sup. Ct. 1976), *aff'd*, 60 A.D.2d 823, 401 N.Y.S.2d 992 (N.Y. 1978)).

133. *See Mutual Life Ins. Co.*, 352 Md. at 567, 723 A.2d at 897 (acknowledging MONY's argument that "statutorily mandated incontestability clauses are not applicable to conditions which manifest themselves prior to the policies").

134. *See supra* notes 63-76 and accompanying text (discussing the *Mixon* and *Haus* courts' rulings that insurance policies may contain clauses limiting coverage without contradicting the statutorily mandated incontestability provisions).

135. The parties stipulated that the sickness that caused Holland's disability manifested prior to the inception of the policy and Holland filed the claim of disability "almost four years after the policy's effective date." *Mutual Life Ins. Co.*, 352 Md. at 565, 723 A.2d at 893.

136. *Cf.* Home Life Ins. Co. v. Regueira, 313 So. 2d 438, 441 (Fla. Dist. Ct. App. 1975) (contemplating the effects of interpreting an incontestability clause as precluding denial of a claim even though the event giving rise to the claim is outside of the scope of coverage of

allows a Maryland resident suffering from an ailment, and even possibly receiving treatment for the ailment, to apply for a disability insurance policy and later recover for injuries caused by that ailment. The insured would only need to claim that he or she was unaware that the symptoms were caused by a particular condition.[137]

b. The Policy Justifications for Incontestability Clauses Have Changed.—The *Mutual Life* court also supported its decision on the grounds that allowing the definition of *sickness* used in the policy would aid the insurer in contravening the intent of the legislature.[138] Regrettably, the court failed to consider, or even acknowledge, relevant changes in the insurance industry and society since 1951 when the statute was first passed. Assuming arguendo that the court's interpretation of the legislative intent in passing section 441 is correct, the possibility remains that changes in society have rendered the original justifications for the statute inconsequential as to how the statute is applied today.[139]

Many of the underlying reasons motivating legislatures to enact incontestability clauses are no longer viable threats to consumers.[140] The most significant justification for statutorily required incontestability clauses was that they give a sense of security to the insured, negating any fear they might have had that the insurance company would fight any claim made under the policy.[141] Incontestability clauses

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the policy and further noting that the "actual calculations upon which the premium rate had been determined could be distorted, with the consequence of increased rates being imposed . . ." in the life insurance policy context).

137. The parties stipulated that Holland's injuries stem from "Acute and Chronic Anxiety with Panic Attacks." *Mutual Life Ins. Co.*, 352 Md. at 565, 723 A.2d at 893. The parties also stipulated that this condition manifested itself prior to the inception of the policy, but that Holland was unaware that this condition had manifested itself. *See id.* However, Holland had received treatment for the symptoms presumably caused by this condition prior to her application for insurance. *See id.* (noting that Holland's policy claim was turned down based on information provided by her doctors that she had, prior to obtaining the policy, complained of "feelings of anxiousness").

138. *See Mutual Life Ins. Co.*, 352 Md. at 573, 723 A.2d at 897 ("[A]n exception to § 441(2) for a pre-existing condition which may have manifested before the effective date of the policy cannot be squared with the purpose of statutorily required incontestability clauses.")

139. *See* Googins, *supra* note 121, at 67, 77 (discussing the original reasons behind incontestability clauses and how societal changes should change the justifications behind statutorily mandated incontestability provisions today).

140. *Id.* at 69-74 (arguing that many of the rationales for incontestability clauses, such as avoiding frivolous litigation, protecting the consumer from the power discrepancies between themselves and the insurer, and ensuring consumer confidence, are not as relevant to the issue as they once were).

141. *See id.*

were also advocated on the grounds that they would aid in decreasing litigation.[142] Neither of these concerns presents a significant danger to modern day insurance consumers. The advancement of state sponsored consumer protection groups has greatly affected the ability of companies to defraud.[143] As one author stated, consumer "departments regularly compile and publish information on complaint indices dealing with sales and settlement practices."[144] Consumer groups also gather and publish information regarding questionable trade practices.[145] In addition, increased litigation is less of a concern today. Modern juries are quite willing to award punitive damages as punishment for inappropriate actions by corporations.[146] Lastly, the power discrepancy between the insurer and the insured is less of an issue because of the increase of contingency fee arrangements and the virtual glut of lawyers in the market.[147]

Additionally, the Court of Appeals in *Mutual Life* failed to consider the significant increase in fraudulent claims over the past few decades.[148] Industry estimates place the amount of fraudulent insurance claims in the range of billions of dollars annually.[149] At least one court has recognized that fraud is a problem of massive proportions.[150] The Court of Appeals has virtually opened the door to additional fraudulent claims by prohibiting insurers from precluding pre-manifested conditions from coverage. As doctors gain the ability to diagnose conditions earlier and earlier, insureds are often tempted to submit fraudulent claims to offset anticipated losses.[151] Either the

142. *See id.* at 69.

143. *See id.* at 70 (discussing the ever expanding role that consumer affairs groups play in examining the sales and claims practices of insurers).

144. *Id.*

145. *See id.*

146. *See id.* (noting the "ever present threat of punitive damage liability and the ever increasing attention given to the market conduct surveillance of insurers").

147. The number of attorneys alone practicing insurance law helps to evidence the lessening of the power struggle. A search of the *Martindale-Hubbell Lawyer Locator* for attorneys that practice insurance law in the state of Maryland revealed 564 listings of lawyers advertising their services as Maryland insurance lawyers (visited June 7, 2000) <http://lawyers.martindale.com/marhub/form/by.html>.

148. *See* Newkirk, *supra* note 45, at 820-21 (stating that "[a]s insurance fraud has become more prevalent, however, . . . [incontestability] clauses have been increasingly used by opportunists as a safe harbor for fraud").

149. *See* Googins, *supra* note 121, at 75 (discussing the staggering increase in fraudulent insurance claims).

150. *Id.* (quoting Merin v. Maglaki, 599 A.2d 1256, 1259 (N.J. 1992)).

151. *See* Sheila J. Carpenter, *The Impact of AIDS on Life and Health Insurance Fraud*, SA93 A.L.I.-A.B.A. 229, 237-40 (discussing fraud in the context of incontestability provisions and noting that not only do the insured sometimes commit fraud but that "third parties [may] assist HIV-positive individuals in perpetrating insurance fraud . . . [and] some doctors have

Court of Appeals or the Maryland Legislature must consider the potential windfall created by the court's decision in *Mutual Life* and act in such a manner as to reverse the dangerous trend.

5. Conclusion.—The threats that forced the need for incontestability clauses are no longer as exigent as they once were, and as such, the combination of an incontestability clause and a pre-existing condition clause could be used together in a policy to protect both the interests of the insurer and the insured. The Court of Appeals, under the guise of legislative intent, has forced insurers to compensate the insured for disabilities specifically outside the scope of their insurance policies. The intent of the Maryland General Assembly to balance the insured's need for assurance of coverage and the insurer's need to define the scope of coverage, would be best met if the court followed the *Haas* line of cases and allowed insurance policies to contain both the statutorily required incontestability clause and a clause prohibiting recovery for illnesses stemming from manifested pre-existing conditions.

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been willing to falsify medical records and provide false attending physician's statements in order to help their patients with AIDS get insurance").

XII. LEGAL PROFESSION

A. *Attorney Can Recover Only Upon Fulfillment of the Contingency When Discharged for a Valid Reason*

In *Somuah v. Flachs*,[1] the Court of Appeals considered whether an attorney who was not licensed in the State of Maryland was entitled to compensation in *quantum meruit*[2] for fees and expenses incurred while representing a client who discharged him after learning he was not licensed to practice in Maryland.[3] After answering in the affirmative, the court then determined the point at which an attorney could be compensated when retained on contingency but discharged prior to its fulfillment.[4] The court overturned the Court of Special Appeals' decision and held that an attorney must await the occurrence of the contingency to recover reasonable compensation.[5] In the court's attempt to strike a balance between a client's right to discharge her attorney and an attorney's right to compensation, it created a new rule by prohibiting recovery in *quantum meruit* until the fulfillment of the contingency.[6] In so doing, the court narrowly defined the practice of law as holding oneself out as an attorney or maintaining an office in the state.[7]

1. The Case.—Jeremy Flachs (Flachs), an attorney, brought suit in *quantum meruit* to recover fees for services rendered and reimbursement costs in connection with his representation of Millicent Somuah and her minor daughter in a personal injury matter.[8] The underlying dispute arose out of an automobile accident on March 8, 1992, in Prince George's County, Maryland, in which Somuah and her minor daughter were severely injured.[9] At the time of the accident, Somuah

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1. 352 Md. 241, 721 A.2d 680 (1998).

2. *Quantum meruit* is defined as

> [t]he reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship. Quantum meruit is still used today as an equitable remedy to provide restitution for unjust enrichment. It is often pleaded as an alternative claim in a breach-of-contract case so that the plaintiff can recover even if the contract is voided.

BLACK'S LAW DICTIONARY 1255 (7th ed. 1999).

3. *See Somuah*, 352 Md. at 246, 721 A.2d at 682 (considering whether an attorney can recover the reasonable value of services rendered prior to discharge).

4. *Id.* at 246-47, 721 A.2d at 682-83.

5. *Id.* at 247, 721 A.2d at 683.

6. *See id.* at 264-65, 721 A.2d at 691.

7. *See id.* at 261-62, 721 A.2d at 690.

8. *See id.* at 246, 721 A.2d at 682.

9. *See id.* at 247, 721 A.2d at 683.

apparently resided in Virginia with her husband.[10] Somuah's brother contacted Flachs sometime after the accident about the possibility of representing Somuah in a personal injury and products liability suit based on injuries from the accident.[11] After visiting Somuah on April 3, 1992, while she was recovering from the accident at a Maryland hospital, Flachs agreed to represent Somuah in her suit.[12] At this time, Somuah and Flachs also signed a retainer agreement that included a thirty-three percent contingency fee to be deducted before the payment of expenses.[13] The agreement also provided that Somuah would pay all costs of investigation, preparation, and trial of the case upon contingency and that Flachs had the right to cancel the agreement if, upon investigation, Somuah's claim did not appear to have merit.[14] Despite entering into the retainer agreement, Flachs did not inform Somuah that he was not licensed to practice law in Maryland.[15] Furthermore, upon entering into the retainer agreement, Flachs immediately began an extensive investigation into Somuah's claim.[16]

After learning that Somuah had moved from Virginia and had established primary residence in Maryland in June 1992, Flachs began to explore the possibility of bringing suit in Maryland.[17] Also, as a

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10. *See id.* Somuah also had a house in Maryland where she went to recuperate in June 1992. *See id.* at 246 n.1, 721 A.2d at 683 n.1. There was, however, some dispute as to where Somuah actually resided—Virginia or Maryland. *Id.* at 247, 721 A.2d at 683.

11. *See id.* at 247, 721 A.2d at 683.

12. *See id.* at 247-48, 721 A.2d at 683.

13. *See id.*

14. *See id.* at 247-48, 721 A.2d at 683; *see also id.* at 247 n.2, 721 A.2d at 683 n.2 (detailing the fee agreement).

15. *See id.* at 247-48, 721 A.2d at 683. There was some evidence to suggest that Flachs thought all along that he would file suit in federal court or in Virginia state court. *See id.*

16. *See id.* at 248, 721 A.2d at 683. Flachs performed the following services for Somuah:

> obtained the police report; interviewed the three or four eyewitnesses; arranged to meet the investigating officer and the eyewitnesses at the accident scene further to determine what happened; obtained medical records from the hospital and from the three or four treating physicians; engaged an expert in highway design safety to report on possibly defective design of the median; put Prince George's County, Maryland on notice under the Local Government Tort Claims Act; engaged a nationally known expert in auto design safety to report on possibly defective seat or seat belt design by the manufacturer; located, purchased, and stored the demolished taxicab; photographed and obtained from others photographs of the petitioner and caused a "day-in-the-life" video film of the petitioner to be made; and met with the petitioner on approximately six occasions.

Id. at 272, 721 A.2d at 695 (Rodowsky, J., dissenting).

17. *Somuah*, 352 Md. at 248, 721 A.2d at 683. The court, however, stated that the suit was likely to be brought in Maryland despite Somuah's Virginia residency. *Id.* at 257, 721 A.2d at 687-88 (stating that "[o]nce [Somuah] became domiciled in Maryland, the possibility of filing in Maryland federal court based on diversity jurisdiction was foreclosed").

result of Somuah's move to Maryland, Flachs asked local counsel to assist him with the Maryland lawsuit.[18] Flachs and local counsel met with Somuah at her home in July 1992.[19] It was during this meeting that Flachs first informed Somuah that he was not licensed to practice in Maryland.[20] Shortly after the meeting, local counsel opted not to assist Flachs.[21] Before Flachs could arrange a meeting with Somuah and another local counsel, Somuah discharged Flachs by letter dated August 20, 1992.[22] Subsequent to his termination, Flachs sent a bill to Somuah for time spent and expenses incurred during his investigation, but Somuah refused to pay.[23]

Shortly thereafter, Flachs filed suit against Somuah in the Circuit Court for Prince George's County, seeking to recover the reasonable value of services rendered and expenses incurred[24] during the course of his representation of Somuah.[25] After both parties' motions for summary judgment were denied, the jury awarded Flachs $19,946.01.[26] On appeal, the Court of Special Appeals affirmed the trial court's judgement for Flachs.[27] The Court of Special Appeals specifically found that Flachs's failure to inform Somuah that he was not licensed in Maryland did not constitute good cause to discharge Flachs and thus Somuah was ordered to pay Flachs for the reasonable value of services he rendered prior to being discharged.[28] Somuah then filed a petition for writ of certiorari to the Court of Appeals.[29] The Court of Appeals granted certiorari to decide whether Flachs was discharged for cause because he failed to inform Somuah that he was not licensed to practice law in Maryland and generally, at what point

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18. *See id.* at 248, 721 A.2d at 683.

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.* at 248-49, 721 A.2d at 683. Flachs sought to recover $8685 (20 hours at $150 per hour for his services rendered) and $11,324.66 for expenses. *See id.* at 273, 721 A.2d at 696 (Rodowsky, J., dissenting).

25. *Somuah*, 352 Md. at 248, 721 A.2d at 683. The automobile accident case for which Somuah retained Flachs was still pending and thus the contingency upon which the relationship began had not been fulfilled. *See id.* at 249, 721 A.2d at 683.

26. *See id.* The jury awarded $8585 for time spent and $11,261.01 as compensation for his expenses. *See* Record Extract at 61, Somuah v. Flachs, 352 Md. 241, 712 A.2d 682 (1998).

27. Somuah v. Flachs, 118 Md. App. 303, 316, 702 A.2d 788, 794 (1997).

28. *Id.* at 316, 702 A.2d at 794.

29. *Somuah*, 352 Md. at 249, 721 A.2d at 684.

can an attorney retained on contingency, discharged prior to its fulfillment recover—immediately or upon the contingency's fulfillment.[30]

2. *Legal Background.*—

a. Development of Case Law Addressing the Timing of Attorney Recovery After Discharge by Client.—It is well settled in Maryland law that a client can freely terminate her attorney.[31] The Court of Appeals has interpreted retainer contracts as containing "an implied term" granting the client such power.[32] Maryland adheres to the "modern rule" which states "that if the client terminates the representation, with or without cause, the client does not breach the retainer contract."[33] Consequently, the discharged attorney cannot recover on the contract[34] and must seek a remedy under the equitable notions of unjust enrichment and *quantum meruit.*

Skeens v. Miller is among the most recent in a long line of Maryland cases[35] to make clear that a client can terminate her attorney at

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30. *Id.* at 246, 721 A.2d at 682.

31. *See, e.g.*, Skeens v. Miller, 331 Md. 331, 335, 628 A.2d 185, 187 (1993) ("It is well settled that the authority of an attorney to act for a client is revokable at the will of the client." (citing Palmer v. Brown, 184 Md. 309, 316, 40 A.2d 514, 517 (1945); Boyd v. Johnson, 145 Md. 385, 389, 125 A. 697, 698-99 (1924); Western Union Tel. Co. v. Semmes, 73 Md. 9, 18, 20 A. 127, 128 (1890); FREDERICK MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 77 (1964); STUART SPEISER, ATTORNEYS' FEES §§ 4.24, 4.32 (1973 & Supp. 1991); CHARLES WOLFRAM, MODERN LEGAL ETHICS § 9.5.2 (1986))).

32. *Id.* ("The client's power to discharge the attorney is an implied term of the retainer contract." (citing Vogelhut v. Kandel, 308 Md. 183, 192, 517 A.2d 1092, 1097 (1986) (Rodowsky, J., concurring); Martin v. Camp, 114 N.E. 46, 48, *reh'g denied*, 114 N.E. 1072 (N.Y. 1916), *modified on other grounds*, 115 N.E. 1044 (N.Y. 1917); SPEISER, *supra* note 31, § 4.24, at 172))).

33. *Skeens*, 331 Md. at 335, 628 A.2d at 187 (citing *Vogelhut*, 308 Md. at 192, 517 A.2d at 1097 (Rodowsky, J., concurring); WOLFRAM, *supra* note 35, § 9.5.2, at 546; Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1, 17 (1988); E. Randall Morrow, Note, *Attorney-Client—Attorney's Right to Compensation When Discharged Without Cause From a Contingent Fee Contract*—Covington v. Rhodes, 15 WAKE FOREST L. REV. 677, 677-78 (1979)).

34. *See id.* ("Because the client's power to end the relationship is an implied term of the retainer contract, the modern rule is that if the client terminates the representation, with or without cause, the client does not breach the retainer contract, and thus, the attorney is not entitled to recover on the contract.").

35. *See* Vogelhut v. Kandel, 308 Md. 183, 192, 517 A.2d 1092, 1097 (1986) (Rodowsky, J., concurring) ("The authority of an attorney to act for a client is revocable at the will of the client." (citations omitted)); Palmer v. Brown, 184 Md. 309, 316, 40 A.2d 514, 517 (1945) (stating that when an attorney is discharged for good-faith prior to the fulfillment of her contract, she may recover for services performed on the partial contract (citations omitted)); Boyd v. Johnson, 145 Md. 385, 389, 125 A. 697, 698-99 (1924) (holding that a retainer contract inherently contains a clause that a client can freely terminate her attorney (citations omitted)); *see also* Western Union Tel. Co. v. Semmes, 73 Md. 9, 18, 20 A. 127, 128 (1890) (stating that a client can freely determine when she would like to settle or terminate a lawsuit).

will. In *Skeens*, an attorney brought suit in *quantum meruit* against his client after alleging the contingency contract he was retained under was terminated by his client without cause.[36] While *Skeens* has made clear that a client must be able to discharge her attorney at will,[37] the court also held that an attorney discharged without cause deserved to be compensated for "the reasonable value of the legal services rendered prior to termination."[38] Upon holding as such, the same issue that faced the *Somuah* court was left to be decided by the *Skeens* court: at what point can the discharged attorney recover, immediately upon termination or only upon fulfillment of the contingency.[39] Under the holding in *Skeens*, Maryland adopted the New York rule[40] by allowing an attorney to recover compensation immediately after being discharged without cause.[41]

In most jurisdictions, an attorney discharged without cause is awarded reasonable compensation, usually in *quantum meruit*,[42] as determined by the New York rule or the California rule.[43] *Martin v. Camp*[44] established what is referred to as the New York rule by holding that an attorney's "cause of action . . . accrue[s] [when] discharged by [his] client and the contract of employment terminate[s]."[45] The Cal-

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36. 331 Md. at 334, 628 A.2d 186-87.

37. *Id.* at 335, 628 A.2d at 187. The court argued that the client's right to terminate her attorney at will is "necessary in view of the confidential nature of the relationship . . . and the evil that would be engendered by friction or distrust." *Id.* (citing *Martin*, 114 N.E. at 48; MACKINNON, *supra* note 31, at 77; SPEISER, *supra* note 31, § 4.24, at 172).

38. *Id.* at 336, 628 A.2d at 187 (citing Attorney Grievance Comm'n v. Kortoki, 318 Md. 646, 670, 569 A.2d 1224, 1236 (1990); *Vogelhut*, 308 Md. at 192, 517 A.2d at 1097 (Rodowsky, J., concurring); *Palmer*, 184 Md. at 316, 40 A.2d at 517; *Boyd*, 145 Md. at 389-90, 125 A. at 699; *Western Union Tel. Co.*, 73 Md. at 20-21, 20 A. at 128; SPEISER, *supra* note 31, § 4.36, at 73-74 (Supp. 1991); WOLFRAM, *supra* note 31, § 9.5.2, at 546; Hillman, *supra* note 33, at 17; Note, *supra* note 33, at 677-78).

39. *Id.* at 335-36, 628 A.2d at 187; *see also infra* note 128 and accompanying text (explaining the question faced by the *Somuah* court).

40. *See infra* notes 43-64 (detailing the New York rule and its counterpart, the California rule).

41. Skeens v. Miller, 331 Md. 331, 343-44, 628 A.2d 185, 191 (1993); *see also infra* notes 65-69 and accompanying text (discussing *Skeens*).

42. *See* Judy Becker Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399, 446 (1992) (commenting that most jurisdictions allow discharged attorneys to recover in some form of *quantum meruit*).

43. *See Skeens*, 331 Md. at 337, 628 A.2d at 188.

44. 114 N.E. 46 (N.Y. 1916).

45. *Id.* at 49; *see also Skeens*, 331 Md. at 338, 628 A.2d at 189 ("Courts following the New York rule hold that the discharged attorney's cause of action accrues immediately upon the termination of the attorney's services without cause, rather than being deferred until the happening of the contingency." (citing Martin v. Camp, 114 N.E. at 48-49 (N.Y. 1916); Tillman v. Komar, 181 N.E. 75, 76 (N.Y. 1932))).

ifornia rule, as established in *Fracasse v. Brent*,[46] states "that the action to recover compensation for services rendered prior to the revocation of a contingent fee contract does not accrue until the occurrence of the stated contingency."[47] The divergence of the two rules is highlighted by the policy reasons supporting each of them; the New York rule concentrates more on the attorney's ability to recover the reasonable value of his services,[48] while the California rule looks to protect the client's interest by alleviating the burden of substantial legal fees upon the termination of her attorney prior to the fulfillment of the contingency.[49]

The underlying rationale of the New York rule as stated in *Tillman v. Koman*[50] states that once a client terminates the retainer agreement with her attorney, the contract has been abandoned.[51] The New York Court of Appeals, established the New York rule by deciding that an attorney discharged without cause must be compensated immediately[52] by reasoning that:

> The value of one attorney's services is not measured by the result attained by another. [The original attorney] did not contract for his contingent compensation on the hypothesis of success or failure by some other member of the bar. A successor may be able to obtain far heavier judgments than the efforts of the original attorney could secure, or, on the other hand, inferior equipment of a different lawyer might render futile an attempt to prove damage to the client.[53]

The Illinois Supreme Court adopted the New York rule articulating three reasons in support.[54] First, the original retainer agreement is a contract, and when a client terminates that contract, it ceases to exist. Therefore, "[a] client cannot terminate the agreement and then resurrect the contingency term when the discharged attorney files a fee claim."[55] Second, a client would be "unjustly enriched if he were to

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46. 494 P.2d 9 (Cal. 1972).

47. *Id.* at 15.

48. *See infra* notes 50-57 and accompanying text (discussing the policy reasons behind the New York rule).

49. *See infra* notes 58-64 and accompanying text (discussing the policy reasons behind the California rule).

50. 181 N.E. 75 (N.Y. 1932).

51. *Id.* at 75.

52. *Id.*

53. *Id.* at 76.

54. *See In re* Estate of Callahan, 578 N.E.2d 985, 988 (Ill. 1991).

55. *Id.*

retain the services without paying for them."[56] Third, the court indicated that the outcome of the lawsuit should not be the only indicator "in calculating that value of an attorney's services."[57]

The California Supreme Court cited two reasons for adopting its rule by emphasizing a client's interests when discharging an attorney.[58]

> First, one of the significant factors in determining the reasonableness of an attorney's fee is the amount involved and the result obtained. It is apparent that any determination of the amount involved is, at best, highly speculative until the matter has finally been resolved. Second, and perhaps more significantly, we believe it would be improper to burden the client with an absolute obligation to pay his former attorney regardless of the outcome of the litigation. The client may and often is very likely to be a person of limited means for whom the contingent fee arrangement offers the only hope of establishing a legal claim. Having determined that he no longer has the trust and confidence in his attorney necessary to sustain that unique relationship, he should not be held to have incurred an absolute obligation to compensate his former attorney.[59]

The California rule has also been applied in other jurisdictions. The Supreme Court of Florida, when deciding *Rosenburg v. Levin*,[60] cited two additional reasons for adopting the California rule.[61] The first rationale was to preserve the client's freedom to terminate her attorney, and the second stated that "any resulting harm to the attorney is minimal because the attorney would not have benefitted earlier until the contingency's occurrence."[62] Finally, *Plaza Shoe Store v. Hermel Inc.*[63] cites "promoting greater confidence in the legal profession and the attorney-client relationship" as a basis for adopting the California rule.[64]

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56. *Id.* (citing Romanek-Golub & Co. v. Anvan Hotel Corp., 522 N.E.2d 1341, 1348 (Ill. App. Ct. 1988); Van C. Argiris & Co. v. FMC Corp., 494 N.E.2d 723, 725-26 (Ill. App. Ct. 1986); Nardi & Co. v. Allabastro, 314 N.E.2d 367, 370 (Ill. App. Ct. 1974)).

57. *Callahan*, 578 N.E.2d at 988.

58. *See* Fracasse v. Brent, 494 P.2d 9, 15 (Cal. 1942) (citing reasons for establishing the rule that a discharged attorney can only recover upon the fulfillment of the contingency).

59. *Id.* at 14 (internal citations omitted) (internal quotation marks omitted).

60. 409 So. 2d 1016 (Fla. 1982).

61. *Id.* at 1022.

62. *Id.*

63. 636 S.W.2d 53 (Mo. 1982) (en banc).

64. *Id.* at 60.

While the California rule emphasizes the client and promotes the public's view of attorneys, the Court of Appeals in *Skeens* adopted the more technical and contract-based New York rule.[65] The court noted that, as indicated above, an "attorney discharged without cause is entitled to compensation for the reasonable value of the services rendered prior to being discharged."[66] Furthermore, the court cited previous rulings that have also held that "an attorney who had been retained on a contingent fee basis was entitled to assert immediately his right to a retaining lien based upon the reasonable value of the legal services provided prior to his discharge without cause."[67] These premises combined convinced the court that the New York rule was most appropriate for Maryland.[68] Therefore, the court held that "where an attorney has been discharged without cause, the attorney's claim in *quantum meruit* accrues immediately upon discharge, notwithstanding the fact that the contingency has not occurred."[69]

It is also important to note that in some circumstances a discharged attorney may not recover at all.[70] In *Attorney Grievance Commission v. Korotki*, the court found that the charging of a seventy-five percent contingency fee by an attorney was excessive and that that type of fee warranted an eighteen-month suspension from practicing law.[71] Despite noting "the prevailing rule that, if the client discharges the attorney for cause, the attorney may not recover any compensation,"[72] the court suspended the attorney and allowed him to recover

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65. Skeens v. Miller, 331 Md. 331, 344, 628 A.2d 185, 191 (1993).

66. *Id.* at 340, 628 A.2d at 190 (citing Palmer v. Brown, 184 Md. 309, 316, 40 A.2d 514, 517 (1945); Boyd v. Johnson, 145 Md. 385, 389, 125 A. 697, 699 (1924); Western Union Tel. Co. v. Semmes, 73 Md. 9, 18, 20 A. 127, 128 (1890)).

67. *Id.* at 343, 628 A.2d at 191 (citing Vogelhut v. Kandel, 308 Md. 183, 190-91, 517 A.2d 1092, 1096 (1986)).

68. *Id.* (reasoning "that the rationale of the courts adopting the New York rule is consistent with our view of the rights and liabilities of the parties to a contingent fee agreement").

69. *Id.* at 343-44, 628 A.2d at 191.

70. *See* Attorney Grievance Comm'n v. Korotki, 318 Md. 646, 669, 569 A.2d 1224, 1236 (1990) (stating that "if the client discharges the attorney for cause, the attorney may not recover any compensation" (citations omitted)); Vogelhut v. Kandel, 308 Md. 183, 192, 517 A.2d 1092, 1097 (1986) (Rodowsky, J., concurring) (stating that an attorney discharged for serious misconduct may not be compensated (citations omitted)). Although several courts cite that an attorney discharged for serious misconduct should be denied compensation even in *quantum meruit*, a case applying this premise in Maryland was unable to be located. *Cf. Korotki*, 318 Md. at 669, 569 A.2d at 1236 (1990) (stating the rule and noting that the attorney did in fact engage in serious misconduct, but allowed for reasonable recovery).

71. *Korotki*, 318 Md. at 670, 569 A.2d at 1236.

72. *Id.* at 669, 569 A.2d at 1236 (citing MacKinnon, *supra* note 31, at 77-80; SPEISER, *supra* note 31, § 4.3,7 at 189-90; EARL W. WOOD, FEE CONTRACTS OF LAWYERS, § 68, at 201-03

a more "reasonable value of his services."[73] Nonetheless, the *Korotki* court indicated that an attorney discharged for serious misconduct could, in fact, lose his right to any compensation.[74]

The standards established by *Skeens* and *Korotki* demonstrate that the dispositive issue when determining whether the attorney will be compensated hinges upon the reasons for the discharge of the attorney.[75] First, as found in *Korotki*, the court noted that if an attorney is discharged for cause he may lose an opportunity to recover compensation.[76] The second category, as found in *Skeens*, allows an attorney discharged without cause to collect a reasonable fee in *quantum meruit*.[77]

b. Statutes and Case Law Governing the Unauthorized Practice of Law.—While the regulation of attorneys is a function of the judicial branch,[78] several state statutes exist to supplement the courts' role.[79] Three Maryland statutes are particularly relevant: Maryland Business Occupations and Professions Code sections 10-601;[80] 10-602;[81] and 10-

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(1936)). *Compare Skeens, supra* note 38 and accompanying text (stating that an attorney discharged without cause can recover a reasonable fee for the services rendered).

73. *Id.* at 670, 569 A.2d at 1236 (citations omitted).

74. *See supra* note 72-73 and accompanying text.

75. *See supra* notes 65-74 and accompanying text (discussing whether an attorney, discharged prior to the fulfillment of a contingency, will recover the reasonable value of his services).

76. *See supra* notes 70-74 and accompanying text (discussing *Korotki*).

77. *See supra* notes 65-69 and accompanying text (discussing *Skeens*).

78. The almost exclusive control behind the court's regulation of the bar is known as the inherent powers doctrine. *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 2 (1998); *see also* Lukas v. Bar Ass'n, 35 Md. App. 442, 447, 371 A.2d 669, 672, *cert. denied*, 280 Md. 733 (1977) (stating that the power to regulate the practice of law is "vested solely in the judicial branch"); Public Serv. Comm'n v. Hahn Transp., Inc., 253 Md. 571, 583, 253 A.2d 845, 852 (1969) (stating that the regulation of attorneys is "essentially and appropriately . . . a function of the judicial branch of the government").

79. *See* MD. CODE ANN., BUS. OCC. & PROF. §§ 10-601, -602, -606 (1998) (prohibiting and explaining the consequences of practicing law in Maryland without a license).

80. *Id.* § 10-601. The statute in full reads:

> § 10-601. Practicing without admission to Bar
>
> (a) In general.—Except as otherwise provided by law, a person may not practice, attempt to practice, or offer to practice law in the State unless admitted to the Bar.
>
> (b) Activities of lawyers on disciplinary status.—While an individual is on inactive status or disbarred or while the individual's right to practice law is suspended or revoked, the individual may:
>
> (1) discharge existing obligations;
>
> (2) collect and distribute accounts receivable; or
>
> (3) perform any other act that is necessary to conclude the affairs of a law practice but that does not constitute practicing law.

606.[82] The applicable part of section 10-601 states as follows: "[e]xcept as otherwise provided by law, a person may not practice, attempt to practice, or offer to practice law in the State unless admitted to the bar."[83] Section 10-602 states that "[u]nless authorized by law to practice in the State, a person may not represent to the public . . . that a person is authorized to practice law in the State."[84] Section 10-606 provides that the unauthorized practice of law is a misdemeanor with a fine not exceeding $5000 or imprisonment not exceeding one year, or both.[85]

While sections 10-601 and 10-602 prohibit the practice of law in Maryland, section 10-101 of the Maryland Business and Occupations and Professions Code attempts to define the "practice of law."[86] Sec-

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(c) No defense to act through lawyer.—It is not a defense to a charge of a violation of this section that the defendant acted through an officer, director, partner, trustee, agent, or employee who is a lawyer.

Id.

81. *Id.* § 10-602. The statute in full reads:

§ 10-602. Misrepresentation as authorized practitioner.

Unless authorized by law to practice law in the State, a person may not represent to the public, by use of a title, including 'lawyer', 'attorney at law,' or 'counselor at law,' by description of services, methods, or procedures, or otherwise, that the person is authorized to practice law in the State.

Id.

82. *Id.* § 10-606. The statute reads in full:

(a) *Practice without admission; misrepresentation.*—

A corporation, partnership, or any other association that violates § 10-601 or § 10-602 of this subtitle is subject to a fine not exceeding $5,000.

An officer, director, partner, trustee, agent, or employee who acts to enable a corporation, partnership, or association to violate § 10-601 or § 10-602 of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $5,000 or imprisonment not exceeding 1 year or both.

Except as provided in paragraphs (1) and (2) of this subsection, a person who violates § 10-601 of this subtitle is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $5,000 or imprisonment not exceeding 1 year or both.

Attorney trust accounts.—A person who willfully violates any provision of Subtitle 3, Part I of this title, except for the requirement that a lawyer deposit trust monies in an attorney trust account for charitable purposes under § 10-303 of this title, is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $5,000 or imprisonment not exceeding 5 years or both.

Other offenses.—Except as provided in subsections (a) and (b) of this section, a person who violates any provision of this title is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000 or imprisonment not exceeding 1 year or both.

Id.

83. *Id.* § 10-601.

84. *Id.* § 10-602.

85. *Id.* § 10-606.

86. *Id.* § 10-101.

tion 10-101(h)(1) defines "giving legal advice" as "representing another person before a unit of the state government or of a political subdivision" or "performing any other service that the Court of Appeals defines" as the practice of law.[87]

Rule 14 of the Rules Governing Admission to the Bar of Maryland[88] in relation to the unauthorized practice of law requires an out-of-state attorney to be specially admitted to practice in Maryland.[89] Other regulations that govern the unauthorized practice of law include the Maryland Lawyer Rules of Professional Conduct Rule 5.5,[90] Rule 7.1[91] and Rule 8.5.[92] These administrative and professional rules

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87. *Id.* § 10-101(h)(1).

88. RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND Rule 14 (1998).

89. *Id.*

90. MARYLAND LAWYER RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1998). The rule reads in full:

Rule 5.5. Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Id.

91. *Id.* Rule 7.1. The rule reads in full:

Rule 7.1. Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law;

(c) or compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Id.

92. *Id.* Rule 8.5. The rule reads in full:

Rule 8.5. Jurisdiction

(a) A lawyer admitted by the Court of Appeals to practice in this State is subject to the disciplinary authority of this State for a violation of these rules in this or any other jurisdiction.

(b) A lawyer not admitted by the Court of Appeals to practice in this State is subject to the disciplinary authority of this State for conduct that constitutes a violation of these Rules and that:

(1) involves the practice of law in this State by that lawyer, or

(2) involves that lawyer holding himself or herself out as practicing law in this State, or

(3) involves the practice of law in this State by another lawyer over whom that lawyer has the obligation of supervision or control.

Id.

further underscore the judicially recognized and statutorily prohibited practice of law without a license.[93]

While these statutes and regulations act as guideposts, it is ultimately left to the Court of Appeals to define the practice of law.[94] On occasion, courts have said that it would not try to formulate a precise definition of the practice of law because such a definition may, in the words of Judge Stern in *Shortz v. Farrell*,[95] "be more likely to invite criticism than to achieve clarity."[96] Maryland courts, however, have recognized several activities that would constitute practicing law. The Court of Special Appeals, quoting *Shortz*, has stated:

> [W]hen a lawyer has, through patient years of study, acquired an understanding of the law and obtained a license to engage in its practice, he applies his knowledge in three principal domains of professional activity:
>
> 1. He instructs and advises clients in regard to the law, so that they may properly pursue their affairs and be informed as to their rights and obligations.
>
> 2. He prepares for clients documents requiring familiarity with legal principles beyond the ken of the ordinary layman—for example, wills, and such contracts . . . are not of a routine nature.
>
> 3. He appears for clients before public tribunals to whom is committed the function of determining rights of life, liberty, and property according to the law of the land, in order that he may assist the deciding official in the proper interpretation and enforcement of the law.[97]

While in *Lukas*, the Court of Special Appeals wrote that representing clients and preparing legal documents constitutes the practice of

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93. *See In re* Application of R.G.S., 312 Md. 626, 627, 541 A.2d 977, 978 (1988) ("As a general rule, a person may not practice law in Maryland until he or she has been admitted to the Bar of this State."); *see also supra* notes 78-92 and accompanying text (quoting the Maryland Rules of Professional Responsibility and other state regulations that prohibit the unauthorized practice of law).

94. *See* Attorney Grievance Comm'n v. James, 340 Md. 318, 324, 666 A.2d 1246, 1248 (1995) ("Ultimately, the Court decides what is the practice of law." (citing Public Serv. Comm'n v. Hahn Transp., Inc., 253 Md. 571, 583, 253 A.2d 845, 852 (1969); Lukas v. Bar Ass'n of Montgomery County, Inc., 35 Md. App. 442, 447, 371 A.2d 669, 672 (1977))).

95. 193 A. 20, 21 (Pa. 1937).

96. *Lukas*, 35 Md. App. at 443, 371 A.2d at 671 (alteration in original) (internal quotation marks omitted) (quoting *Shortz*, 193 A. at 21).

97. *Id.* at 444, 371 A.2d at 671 (alteration in original) (internal quotation marks omitted) (quoting *Shortz*, 193 A. at 21).

law,[98] the Court of Appeals has held "that the practice of law includes 'utilizing legal education, training, and experience [to apply] the special analysis of the profession to a client's problem.'"[99] Similarly, the court has held that "[d]epending on the circumstances, meeting with prospective clients may also constitute the practice of law because 'the very acts of interview, analysis and explanation of legal rights constitute practicing law in Maryland.'"[100]

In support of her contention that Flachs did not deserve any compensation because he committed serious misconduct by practicing law in a state where he was not licensed, Somuah cited four out-of-jurisdiction cases that disallowed recovery to an attorney, in varying degrees, for practicing in a state in which he was not licensed.[101] In *Perlah v. S.E.I. Corp.*,[102] an attorney, licensed only in New York, was denied compensation for legal services he performed in Connecticut prior to becoming licensed in the state.[103] The attorney was denied compensation for "prepar[ing] legal documents" and "form[ing] a Connecticut corporation"[104] because the court considered him to be practicing law in Connecticut without a license.[105]

Similarly, in *Taft v. Amsel*,[106] a New York attorney was found to be practicing law in Connecticut without a license and was subsequently denied compensation.[107] The attorney provided a range of services for his clients including forming corporations, negotiating to acquire other companies, and managing the corporation.[108] Because the court asserted that it was impossible to determine at what point the attorney was acting as the client's attorney and not as a member of the

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98. *Id.* at 447-48, 371 A.2d at 672-73 (stating that when an attorney prepares documents and represents a client in a judicial proceeding, the attorney is practicing law (citing *Hahn Transp.*, 253 Md. at 580-81, 253 A.2d at 850)).

99. *James*, 340 Md. at 324, 666 A.2d at 1248 (alteration in original) (quoting Kennedy v. Bar Ass'n of Montgomery County, Inc., 316 Md. 646, 662, 561 A.2d 200, 208 (1989)).

100. *Id.* (quoting *Kennedy*, 316 Md. at 666, 561 A.2d at 210).

101. *Somuah*, 352 Md. at 259, 721 A.2d at 689; *see* Perlah v. S.E.I Corp, 612 A.2d 806, 809 (Conn. App. Ct. 1992) (denying compensation to attorneys who practiced law in a state where they were not licensed); Taft v. Amsel, 180 A.2d 756, 757 (Conn. Super. Ct. 1962) (same); Lozoff v. Shore Heights, 362 N.E.2d 1047, 1049 (Ill. 1977) (same); Spivak v. Sachs, 211 N.E.2d 329 (N.Y. 1965) (same).

102. 612 A.2d 806 (Conn. App. Ct. 1992).

103. *Id.* at 807, 809.

104. *Id.* at 807.

105. *Id.* at 809. It should be noted that the attorney was permitted to collect reasonable compensation for services performed after he became licensed to practice in Connecticut. *Id.*

106. 180 A.2d 756 (Conn. Sup. 1962).

107. *Id.* at 756, 757.

108. *See id.* at 757. The court wrote that the attorney's services "in attempting to build this traffic empire were extensive, intricate and at times intriguing." *Id.*

corporation,[109] the court reasoned that the attorney was practicing law without a license in the state and that he could not recover compensation for legal services unless he has "been duly admitted to practice before the court."[110]

In *Lozoff v. Shore Heights, Ltd.*,[111] the Illinois Supreme Court held that an unlicensed Wisconsin attorney could not recover for legal services that included negotiations and the preparation of documents for a client's real estate transaction in Illinois.[112] To support its decision, the court emphasized that the attorney was practicing law in the state without a license.[113] Finally, in *Spivak v. Sachs*,[114] a California attorney was denied compensation for services performed while in New York, for a New York resident, in connection with his client's "matrimonial litigation."[115] The attorney's work included examining "drafts of separation agreements," arranging and attending several meetings on his client's behalf, and advising his client using his "knowledge of both New York and California law" despite being licensed only in California.[116] The New York Court of Appeals "recogniz[ed] the numerous multi-State transactions and relationships of modern times,"[117] and argued that "we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."[118] The court, however, decided that the attorney's conduct was illegal and therefore deserved no compensation for the legal services rendered.[119]

Shortly after the Court of Appeals of Maryland gave its opinion in *Somuah*, the Supreme Court of California decided a case that presented similar issues in that it attempted to define what constitutes the practice of law in the state by unlicensed practitioners.[120] In *Bir-*

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109. *Id.* There was some question as to what the attorney's role exactly was in the corporation he helped form. *See id.*

110. *Id.*

111. 362 N.E.2d 1047 (Ill.1977).

112. *Id.* at 1048.

113. *Id.*

114. 211 N.E.2d 329 (N.Y. 1965).

115. *Id.* at 330-31.

116. *Id.* at 330.

117. *Id.* at 331 (citing Apell v. Reiner, 204 A.2d 146, 148 (N.J. 1964)).

118. *Id.* (citing *Apell*, 204 A.2d at 148); *see also Lozoff*, 362 N.E.2d at 1049 ("We recognize there are transactions involving parties' attorneys from more than one State which would require a result different from today's holding.").

119. *See id.* (holding that the attorney's conduct was illegal and therefore he should not receive compensation).

120. *See* Birbrower v. The Superior Court of Santa Clara County, 949 P.2d 1, 5 (Cal. 1998) (establishing the "sufficient contact" test to define the practice of law).

brower, a group of New York attorneys (Birbrower) filed a counterclaim against their former California client for fees associated with their representation.[121] The court denied Birbrower nearly one million dollars in compensation by finding that Birbrower did indeed practice law in the state without a license, thereby precluding compensation for services performed while in California.[122] Some of the activities that the court cited to support its finding included making recommendations and giving advice, strategizing to resolve disputes, holding meetings on behalf of the client, and negotiating a settlement.[123] In rendering its decision the California Supreme Court established the "sufficient contact" test as a means to determine whether an attorney was practicing law in California.[124] The court opined:

> In our view, the practice of law "in California" entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contact will not sustain a finding that the unlicensed lawyer practiced law "in California." The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.[125]

While the court established the sufficient contact test, it also argued: "[c]onversely, although, we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person *automatically* practices California law 'in California' whenever that person practices law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite."[126] Therefore, Birbrower was entitled to recover legal fees and expenses for the services that he performed in New York, even though it was for a California client.[127]

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121. *Id.* at 4. The client originally sued Birbrower for malpractice, alleging the practice of law in California without a license.

122. *Id.* at 4, 13.

123. *Id.* at 3.

124. *See id.* at 5 (ruling that "sufficient contact" with California will result in a finding that an out-of-state attorney has practiced law in the state).

125. *Id.*

126. *Id.* at 6 (citing Baron v. City of Los Angeles, 469 P.2d 353, 358 (Cal. 1970)).

127. *See id.* at 11; *see also* Perlah v. S.E.I., 612 A.2d 806, 809 (denying an attorney compensation for work performed prior to being admitted to the bar in the state, but allowing recovery thereafter).

3. The Court's Reasoning.—In *Somuah v. Flachs*, the Court of Appeals held that an attorney discharged for reasons other than serious misconduct, but in "good faith," could not recover in *quantum meruit* until the contingency for which he was retained is fulfilled.[128] The court first acknowledged that a client can exercise great discretion when terminating an attorney.[129] Because of "the confidential nature" of the attorney-client relationship and "the evil that would be engendered by friction or distrust"[130] a client may discharge an attorney upon any "reasonable subjective dissatisfaction."[131] The client maintains an "absolute right" to discharge an attorney despite having retained the attorney under a contingent fee agreement.[132] The court explained that it had not specifically addressed what constitutes a proper basis for terminating an attorney-client relationship in prior decisions,[133] but it recognized that many jurisdictions permitted *quantum meruit* recovery by the attorney even when there was a good faith reason why the client terminated his relationship with the attorney.[134]

In support of the client's right to discharge her attorney, the court classified an attorney-client agreement as "a form of contract for performance of personal services," which the client can terminate at any time if the attorney's services are unsatisfactory regardless of whether the contract is on a contingent basis.[135] The court also qualified the attorney-client relationship as one of an employer and employee, and stated that similar to a contract for personal services, the

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128. *Somuah*, 352 Md. at 268, 721 A.2d at 693. In dicta, the court wrote that an attorney discharged in "bad faith" or without "just cause" has an "immediate cause of action for breach of the fee contract." *Id.* at 255, 721 A.2d at 687.

129. *Id.* at 250, 721 A.2d at 684.

130. *Id.* at 251, 721 A.2d at 684 (internal quotation marks omitted) (quoting Skeens v. Miller, 331 Md. 331, 335, 628 A.2d 185, 187 (1993)).

131. *Id.*; *see also Skeens*, 331 Md. at 335, 628 A.2d at 187 (commenting that the power of the client to discharge his or her attorney "is an implied term of the retainer contract" (citations omitted)).

132. *Somuah*, 352 Md. at 251, 721 A.2d at 685 (citing ROBERT L. ROSSI, ATTORNEY'S FEES § 3:18, at 167-68 (2d ed. 1995)).

133. *Id.* at 251, 721 A.2d at 685. The court however explained situations where an attorney must forfeit his fees. *Id.* For instance, attorneys are not entitled to fees if they represent "conflicting interests," where the agreement was induced by "fraud or undue influence," or where the agreement violates the Maryland Lawyers' Rules of Professional Conduct. *Id.* at 251-52, 721 A.2d at 685 (citations omitted).

134. *Id.* at 252, 721 A.2d at 685 ("It is noteworthy that many jurisdictions found, or indicated that there was, cause for termination but still permitted *quantum meruit* recovery by the attorney.").

135. *Id.* at 254, 721 A.2d at 686.

employer-employee relationship is revocable at the will of an unsatisfied employer.[136]

Upon establishing that a client can virtually terminate a relationship with an attorney at will,[137] the court then claimed that the discharge could be placed into one of two categories, as established by previous Maryland case law.[138] The first category is when an "attorney commits serious misconduct, i.e. fraud or illegal conduct."[139] The second category is when "the attorney acts competently and there is no serious misconduct, but the client has a good faith basis to be dissatisfied with the attorney."[140] These two categories establish a bright line rule determining what circumstances allow an attorney to be compensated for work performed.[141] In the first case, characterized as "cause" by the court, the attorney is not entitled to any fee.[142] In the second situation, considered "no cause," the attorney is entitled to compensation.[143] The distinguishing issue of the present case, however, was when an attorney is terminated without cause, but by a reasonably dissatisfied client,[144] at what point can he recover fair compensation for the services rendered; immediately upon discharge or only on fulfillment of the contingency.[145]

The court stated that Somuah did in fact have a good faith basis to be dissatisfied with Flachs because he did not inform her that he was not licensed to practice law in Maryland until three months after agreeing to represent her.[146] Furthermore, the court also recognized that Maryland was the "likely" forum for Somuah's lawsuit,[147] and that Flachs accrued over $20,000 in fees and expenses, in Maryland, after

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136. *See id.* (explaining that "[t]he right of a dissatisfied client to discharge an attorney is analogous to the right of a dissatisfied employer to discharge an employee under a contract of employment specifying that the employee's services must be satisfactory to the employer").

137. *Id.* at 250, 721 A.2d 684; *see also* Skeens v. Miller, 331 Md. 331, 335, 628 A.2d 185, 187 (1993) (stating that "[i]t is well settled that the authority of an attorney to act for a client is revocable at the will of the client" (citations omitted)).

138. *Somuah*, 352 Md. at 256, 721 A.2d at 687.

139. *Id.*

140. *Id.* The court noted that the trend in most jurisdictions is to allow the attorney to recover in *quantum meruit* when discharged by the client in good faith. *Id.* at 258, 721 A.2d at 688 (citing Crockett & Brown v. Courson, 849 S.W.2d 938, 940-41 (Ark. 1993); Kopelman and Assoc. v. Collins, 473 S.E.2d 910, 917 (W. Va. 1996)).

141. *Id.* at 256, 721 A.2d at 687.

142. *Id.*

143. *Id.*

144. *Id.* at 258, 721 A.2d 688.

145. *Id.* at 256, 257, 721 A.2d at 688.

146. *Id.* at 257, 721 A.2d at 688.

147. *Id.*

beginning his investigation without ever consulting Maryland counsel.[148] These factors convinced the court that Somuah did in fact have a "good faith basis" to lack confidence and become dissatisfied with Flachs.[149] The court, however, held that Flachs's conduct did not rise to the level of serious misconduct prohibiting due compensation.[150]

To support its ruling that Flachs's conduct was not serious, the court distinguished the four cases from other jurisdictions, cited by *Somuah*.[151] These cases supported the contention that Flachs practiced law without a license in violation of Maryland Business and Professions Code sections 10-601(a), 10-602 and Rule 14 of the Maryland Rules Governing Admission to the Bar.[152] The court implied that the four cases differed because they all involved instances where the attorney's conduct was egregious and deceiving.[153] For example, in these cases prohibiting recovery of costs, the attorneys "draft[ed] documents or advis[ed] the clients regarding matters of local law."[154] Furthermore, the court noted that, in *Perlah*, *Taft* and *Lozoff*, the attorneys fraudulently represented themselves as attorneys of the state in which they were not licensed.[155] Moreover, the court noted that in *Perlah* the attorney maintained an office in the state where the attorney was not licensed to practice.[156] Finally, the court highlighted that *Lozoff* and *Spivak* "explicitly cautioned against a *per se* ruling denying compensation to all out-of-state attorneys who perform transactions in a

148. *Id.* at 249, 257, 721 A.2d at 683, 688. Despite having recognized that the claim was likely to be filed in Maryland all along, the court mentioned that the attorney could have filed in federal court based on diversity jurisdiction had the client remained at her initial residence in Virginia. *Id.* at 257, 721 A.2d at 688. The court also emphasized that the attorney performed competently. *Id.* at 256, 721 A.2d at 687. These findings were probably the underlying motivation for the court to assure that Flachs has a chance to recover compensation. *See id.* at 264, 721 A.2d at 691 (noting that "[a]lthough [Flachs] was properly discharged, [Flachs] has not engaged in any serious misconduct that justifies forfeiture of any compensation for services").

149. *Id.* at 257, 721 A.2d at 688.

150. *Id.* at 258, 721 A.2d at 688.

151. *Id.* at 259-61, 721 A.2d at 689-90 (discussing Perlah v. S.E.I, 612 A.2d 806, 809 (Conn. App. 1992); Lozoff v. Shore Heights, Ltd., 362 N.E.2d 1047, 1048 (Ill. 1977); Spivak v. Sachs, 211 N.E.2d 329 (N.Y. 1965); Taft v. Amsel, 180 A.2d 756, 757 (Conn. Super. 1962), all of which denied compensation to attorneys who practiced law in a state where they were not licensed).

152. *Somuah*, 352 Md. at 259, 721 A.2d at 688-89; *see also supra* notes 79-81, 88-89 and accompanying text (citing the relevant statutory text and administrative rules).

153. *Somuah*, 352 Md. at 261, 721 A.2d at 690.

154. *Id.*

155. *Id.*

156. *Id.*

state in which they are not licensed, noting the frequency of multi-state transactions in modern times."[157]

Despite citing past decisions that held that "meeting with prospective clients may . . . constitute the practice of law because 'the very acts of interview, analysis, and explanation of legal rights constitute practicing law in Maryland,'"[158] the court ruled that Flachs's investigation and preservation of evidence was not the unauthorized practice of law.[159] The court agreed with Somuah that an out-of-state attorney should disclose that he is not licensed in the particular state and advise the client that local counsel may have to be retained.[160] Nevertheless, the court reasoned that an attorney's failure to disclose that he is not licensed in a particular state should not result in the loss of all compensation because this would result in the client's unjust enrichment.[161] In addition, because Flachs's work benefitted Somuah's subsequent attorney in her products liability claim against Chrysler, the court sought to prevent a "windfall" on Somuah's behalf by allowing her to utilize Flachs's work without paying a fair price.[162] In so ruling, the court attempted to "strike a balance between the client's absolute right to discharge his or her attorney and the attorney's right to fair compensation for services competently rendered prior to discharge."[163]

After determining that Flachs did indeed deserve compensation for the services he rendered to Somuah, the court had to then decide

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157. *Id.* (citing Spivak v. Sachs, 211 N.E.2d 329 (N.Y. 1965); Lozoff v. Shore Heights, Ltd., 362 N.E.2d 1047, 1049 (Ill. 1977)).

158. *Id.* at 262, 721 A.2d at 690 (alteration in original) (internal quotation marks omitted) (quoting Attorney Grievance Comm'n v. James, 340 Md. 318, 324, 666 A.2d 1246, 1248 (1995) (quoting Kennedy v. Bar Ass'n of Montgomery County, 316 Md. 646, 666, 561 A.2d 200, 210 (1988))).

159. *Id.* (explaining that "unlike in Kennedy, [Flachs] did not expressly hold 'himself out to the public as an attorney engaged in the general practice of law in Maryland' and did not maintain his principal office in Maryland" (quoting *Kennedy*, 316 Md. at 659, 561 A.2d at 207)).

160. *Id.*

161. *Id.* at 263, 721 A.2d at 691. The court stated that

> [o]ften "a clients's termination of an attorney–client relationship will not be 'wrongful' but . . . the attorney's conduct will also not be 'wrongful' to the extent that it should bar *quantum meruit* recovery of attorney fees. In such circumstances, it would be unfair not to compensate the attorney for work completed before the discharge under the equitable doctrine of *quantum meruit*."

Id. (alteration in original) (quoting Polen v. Reynolds, 564 N.W. 467, 471 (Mich. Ct. App. 1997)).

162. *Id.* at 266, 721 A.2d 692; *see also id.* at 265, 721 A.2d at 692 ("The primary consideration is to what extent have the attorney's services directly benefitted the client." (citing Kenny v. McAllister, 198 Md. 521, 525, 84 A.2d 897, 899 (1951))).

163. *Id.* at 264-56, 721 A.2d at 691.

at what point he could recover, immediately upon discharge, or only upon fulfillment of the contingency.[164] To support its holding that "[w]here any fee is contingent on recovery by the client and where . . . there has been some basis for the client being dissatisfied with the attorney, the contingency generating the fee must occur prior to the attorney's recovery,"[165] the court needed to reconcile its decision with *Skeens v. Miller*,[166] which addressed the very issue of a discharged attorney's timing of recovery.[167] The *Skeens* court adopted the New York rule[168] by holding that "where an attorney has been discharged without cause, the attorney's cause of action in *quantum meruit* accrues immediately upon the termination of the contingent agreement, and the attorney is not required to wait until the contingency is fulfilled."[169] The *Somuah* court found that *Skeens* was not controlling because the attorney in *Skeens* was discharged "*without* any good faith basis prior to the occurrence of the contingency,"[170] unlike the instant case where Somuah did in fact have a valid reason to be dissatisfied with and discharge Flachs.[171] Thus, *Somuah* was distinguished from *Skeens* and, by the court's holding, Flachs was not entitled to compensation until Somuah resolved her dispute with the Chrysler Corporation.[172]

Judge Rodowsky, in his dissent, argued that the majority opinion "muddles" well-settled Maryland law on attorney-client retainer contracts in which he divided into five categories.[173] The majority's opinion, as interpreted by Judge Rodowsky, established two categories of discharge that he termed "High Grade" and "Low Grade" cause.[174] Judge Rodowsky agreed with the majority that High Grade cause ex-

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164. *Id.* at 266-67, 721 A.2d at 692.

165. *Id.* at 267, 721 A.2d at 693.

166. 331 Md. 331, 628 A.2d 185 (1993).

167. *See supra* notes 39, 66 and accompanying text (discussing the holding of *Skeens*).

168. *See supra* note 65 and accompanying text (stating that *Skeens* adopted the New York rule).

169. *Somuah*, 352 Md. at 267, 721 A.2d at 693 (citing *Skeens*, 331 Md. at 343-44, 628 A.2d at 191).

170. *Id.* at 266-67, 721 A.2d at 692 (citing *Skeens*, 331 Md. at 336-37, 628 A.2d at 188).

171. *Id.* at 267, 721 A.2d at 693.

172. *See id.* at 267-68, 721 A.2d at 693 ("We conclude that the attorney's claim accrues upon the fulfillment of the contingency, i.e., where the plaintiff/former client obtains a final judgement.").

173. *Id.* at 269, 721 A.2d at 693-94 (Rodowsky, J., dissenting). Judge Rodowsky's five "well-settled" aspects of Maryland law include: (1) a client can terminate her attorney at will, (2) the client does not breach the retainer contract by discharging her attorney, (3) when a client discharges his attorney for serious misconduct, the attorney cannot recover compensation, (4) an attorney is entitled to compensation when he is terminated without cause, or the attorney justifiably terminates the attorney-client relationship, and (5) "the holding in *Skeens*." *Id.* at 269-70, 721 A.2d at 694 (citations omitted).

174. *Id.* at 270, 721 A.2d at 694.

cused the client "from paying promised compensation" when the attorney committed serious misconduct.[175] Low Grade cause, Judge Rodowsky stated, was a "creature of the majority," that he defined as a "bona fide dissatisfaction on the client's part with the attorney's performance."[176] Judge Rodowsky reasoned that a client cannot terminate her attorney for Low Grade cause because "[t]here is no such thing."[177] Therefore, according to Judge Rodowsky, "the attorney's right to sue, where the retainer contract has been terminated by the client without traditional, *i.e.*, High Grade cause, is not deferred or converted into a contingent claim."[178]

To distinguish *Somuah* from *Skeens*, Judge Rodowsky stated that the majority created Low Grade cause[179] by "borrowing from cases involving contracts under which the promisor's obligation to continue to pay for personal services is *expressly* conditioned on the promisor's continued satisfaction."[180] Judge Rodowsky disagreed with the majority on this point because under previous Maryland employment law, there must be an express term in the contract for a contract to be "conditioned upon the employer's subjective satisfaction."[181] Judge Rodowsky further explained that the Somuah-Flachs retainer contract did not contain an express satisfaction provision.[182] Additionally, satisfaction clauses are wholly unnecessary because attorney-client relationships are terminable at will[183] and if such a clause were read into the retainer contract it "would operate as a limitation on the power of the client to terminate."[184]

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175. *Id.* The determination of whether an attorney committed High Grade cause is to be made objectively. *Id.*

176. *Id.* Low Grade cause, as defined by Judge Rodowsky, is the equivalent to the majority's phrase, "a 'basis' for an attorney's discharge." *Id.* (quoting *Somuah*, 352 Md. at 264, 721 A.2d at 691). According to Judge Rodowsky, Low Grade cause constitutes a subjective standard. *Id.* at 270, 721 A.2d at 694.

177. *Id.* at 271, 721 A.2d at 694.

178. *Id.*

179. *Id.* at 270-71, 721 A.2d at 694-95 ("Under Maryland law prior to today cause was either traditional or High Grade cause, or it was not cause at all.").

180. *Id.* at 273, 721 A.2d at 696 (citing *Somuah*, 352 Md. at 254, 721 A.2d at 686).

181. *Id.* (Rodowsky, J., dissenting). The dissent distinguished *Ferris v. Polansky*, 191 Md. 79, 59 A.2d 749 (1948) and *H & R Block, Inc. v. Garland*, 278 Md. 91, 359 A.2d 130 (1976), used by the majority, by noting that the contracts in these cases had express satisfaction clauses, while the contract in the case at bar did not. *Somuah*, 352 Md. at 274-75, 721 A.2d at 696 (Rodowsky, J., dissenting).

182. *Id.* at 275, 721 A.2d at 696.

183. *Id.* (citing Skeens v. Miller, 331 Md. 331, 335, 628 A.2d 185, 187 (1993)).

184. *Id.*

Furthermore, Judge Rodowsky argued that since Somuah terminated the contract without a "material breach" by Flachs,[185] his claim became "one for restitution, and the damages are the value of services rendered prior to the date of termination."[186] Finally, because Somuah (and her subsequent attorney) immediately benefitted from Flachs's services, as in *Skeens*, "the claim in *quantum meruit* unconditionally accrues at the time of termination."[187]

4. Analysis.—

a. Balancing the Client's and the Attorney's Interests.—This Note argues that the Court of Appeals's attempt to balance the interests of the attorney and the client, while laudable in that it protects the attorney's right to recover compensation for services rendered, and perhaps more importantly the client's constitutional interest in maintaining her choice of counsel, the decision may present an unworkable standard that creates uncertainty for future litigation. Even more troubling, is the narrow definition of the practice of law used by the court to assure each party's—the attorney and the client—interests were accounted for. Finally, the article will offer a possible solution to the problems created by the Maryland decision using a recently decided California case.

In its effort to "strike a balance" between the client's absolute right to discharge her attorney and the attorney's right to reasonable and fair compensation,[188] the *Somuah* court held that when a client has some "basis for . . . being dissatisfied with the attorney, the contingency generating the fee must occur prior to the attorney's recovery."[189] Prior to *Somuah*, a discharged attorney could be discharged for one of two reasons, for cause or without cause.[190] An attorney would receive no compensation if he were discharged for cause meaning that he committed fraud or illegal conduct.[191] If a client discharged an attorney without cause, or for reasons anything less than

185. Judge Rodowsky did not discuss whether Flachs engaged in the unauthorized practice of law and therefore considered him to be discharged without "traditional" or High Grade cause. *Id.* at 270-71, 721 A.2d at 694-95 (reasoning under the premise that Flachs did not engage in the unauthorized practice of law).

186. *Id.* at 276, 721 A.2d at 697.

187. *Id.*; *see also Skeens*, 331 Md. at 343-44, 628 A.2d at 191 (holding that an attorney discharged without cause can bring a cause of action immediately).

188. *Somuah*, 352 Md. at 264-65, 721 A.2d 691.

189. *Id.* at 267, 721 A.2d at 693.

190. *See supra* notes 76-77 and accompanying text (defining for cause and without cause as reasons for dismissal).

191. *See supra* notes 72-74 and accompanying text (explaining that an attorney discharged for serious misconduct may not be compensated).

fraud or illegal conduct, the attorney would be compensated immediately upon discharge.[192] *Somuah* created what can be considered a third category of discharge that the majority calls "basis" and the dissent calls Low Grade cause. According to the *Somuah* majority, a client has a basis to discharge an attorney when the attorney does not commit serious misconduct but the client still has a valid good faith reason to be dissatisfied.[193] When discharged with a basis or Low Grade cause, the attorney will be paid if, and only if, the contingency for which he was originally obtained under is fulfilled.[194]

The court acknowledged that when Somuah retained Flachs as her lawyer, she fully expected that he would be able to represent her in "any court proceedings."[195] When he informed her he was not authorized to practice law in the state of Maryland, but could lawfully retain local counsel, the court concluded that Somuah "had a basis for losing confidence" in Flachs.[196] The court, however, ruled that Flachs's conduct did not qualify as, or rise to serious misconduct, thereby assuring an opportunity to recover compensation depending on the outcome of Somuah's litigation.[197] By rendering its decision in the manner it did, the court attempted to balance the client's right to discharge an attorney because of a reasonable dissatisfaction and the attorney's right to recover for services rendered.[198]

b. Uncertainty Created by the Court's Decision.—The *Somuah* decision blurs what was once a bright line rule regarding when an attorney may recover after being discharged.[199] By establishing a third category of discharge, the *Somuah* court leaves in doubt whether an attorney will ultimately recover costs upon discharge by a dissatisfied client.[200] Before *Somuah*, the court was merely required to determine whether an attorney was discharged for serious misconduct when deciding if an attorney deserved compensation for his services.[201] If the

192. *See supra* note 69 and accompanying text (citing that an attorney discharged without cause can recover immediately in *quantum meruit*).

193. *Somuah*, 352 Md. at 264, 721 A.2d 691.

194. *See id.* at 267-68, 721 A.2d 693; *see also supra* notes 171-172 and accompanying text.

195. *Somuah*, 352 Md. at 257, 721 A.2d at 688.

196. *Id.* at 257-58, 721 A.2d at 688.

197. *See id.* at 267-68, 721 A.2d at 693 (holding that Flachs must await the outcome of Somuah's case against Chrysler "to maintain his action for compensation").

198. *Id.* at 265-66, 721 A.2d 692.

199. *See id.* at 269, 721 A.2d at 693 (Rodowsky, J., dissenting) (stating that the majority's decision "unnecessarily muddles Maryland law concerning attorney-client contracts").

200. *See id.* at 267-68, 721 A.2d at 693 (holding that Flachs must await the occurrence of the contingency to be compensated).

201. *See supra* notes 75-77 and accompanying text (citing *Skeens* and *Korotki* as establishing the defining issues of an attorney's recovery).

attorney was discharged for cause he would be denied compensation,[202] if he was discharged without cause he would be paid immediately upon discharge.[203]

With the *Somuah* holding, however, courts must now undertake a second layer of analysis when an attorney is discharged. After deciding whether or not the attorney deserves compensation—whether the attorney was discharged for cause or without cause—the court now must also consider at what point the attorney can recover, on occurrence of the contingency or immediately upon termination.[204]

The *Somuah* decision did not change the fact that an attorney discharged for cause may be denied compensation.[205] The uncertainty and subjectivity of the analysis now required by the *Somuah* decision manifests when an attorney is discharged without cause.[206] Upon deciding that an attorney was discharged without cause, the court must then scrutinize if there was actually a valid reason for the client to discharge her attorney or whether the client had a reasonable basis for dissatisfaction, as in *Somuah*.[207] If there is a reasonable basis for the client to discharge her attorney, he must then await the occurrence of the contingency to be compensated.[208] If, however, the attorney is discharged by the client, for anything less than reasonable dissatisfaction, or without cause, the attorney can bring his action for compensation immediately upon termination.[209] While in theory the framework established by the *Somuah* court is reasonable, complicating and confusing the issue is that the decision lacks any workable standard whereby a reasonable prediction can be made on when an

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202. *See, e.g.*, Attorney Grievance Comm'n v. Korotki, 318 Md. 646, 669, 569 A.2d 1224, 1236 (1990) (stating that when an attorney is discharged for cause he may not recover compensation).

203. *See* Skeens v. Miller, 331 Md. 331, 343-44, 628 A.2d 185, 191 (1993) (holding that "where an attorney has been discharged without cause, the attorney's claim in *quantum meruit* accrues immediately upon discharge, notwithstanding the fact that the contingency has not occurred").

204. *See Somuah*, 352 Md. at 267-68, 712 A.2d at 693 (holding that when an attorney is discharged for a valid reason he must await the occurrence of the contingency to recover); *see also supra* note 172 and accompanying text.

205. *See supra* note 202 and accompanying text (explaining that an attorney discharged for cause may be denied compensation).

206. *See Somuah*, 352 Md. at 267, 721 A.2d at 693 (distinguishing *Skeens* from the case at bar).

207. *See id.* at 266-67, 721 A.2d at 692-93 (examining the reasons for an attorney's discharge to determine when he will be compensated).

208. *Id.* at 267-68, 721 A.2d at 693 (holding that an attorney discharged because of a reasonable dissatisfaction on the client's behalf must await the occurrence of the contingency to recover).

209. *See Skeens*, 331 Md. at 343-44, 628 A.2d at 191 (holding that an attorney discharged without cause may recover in *quantum meruit* immediately).

attorney may recover after being terminated by a dissatisfied client and at what point must a client compensate an attorney she has terminated.[210] While the *Somuah* decision laudably promotes the client's interest by allowing a reasonably dissatisfied client to discharge her attorney without being burdened by the original retainer agreement,[211] the holding allows the court great discretion to determine, on a case by case basis, what will constitute reasonable dissatisfaction. The *Somuah* decision is inherently subjective, ultimately resulting in uncertainty about the terms of compensation for both parties, in the event that a client terminates her attorney.

Prior to *Somuah*, Maryland followed the New York rule when an attorney was discharged for any reason other than serious misconduct.[212] Under the New York rule, as applied in *Skeens*, if the attorney was discharged for any reason other then serious misconduct the client was required to pay in *quantum meruit* immediately.[213] While applying the New York rule allowed for a bright line test,[214] it did not provide a mechanism for a client with a reasonable good faith excuse, amounting to less than serious misconduct, to discharge her attorney, retained on contingency, without having to compensate the attorney immediately.[215]

The *Somuah* court, by its holding, essentially required the application of the California rule when an attorney is discharged for basis—somewhere in between the established categories of for cause and without cause.[216] In this regard, the *Somuah* decision fills the gap left

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210. All the decision offers as a standard are the facts that an attorney's failure to notify his client, until three months after they signed a retainer agreement, that he was not licensed in the state and thereby could not represent her without local counsel could cause reasonable dissatisfaction to a client. This necessitates a very fact-based and at times subjective inquiry by the court to determine whether an attorney was discharged for cause or without cause.

211. *See supra* notes 58-64 and accompanying text (citing the policy reasons in support of the California rule).

212. *See supra* note 65 and accompanying text (citing *Skeens v. Miller* as adopting the New York rule in Maryland).

213. *See supra* note 69 and accompanying text (citing the application of the New York rule).

214. *See* Tillman v. Komar, 181 N.E. 75 (1932) (stating that "[e]ither the [retainer contract] wholly stands or totally falls").

215. *See Somuah*, 352 Md. at 267-68, 721 A.2d at 693 (holding that a client with a basis to be dissatisfied with her discharged attorney is not responsible to compensate him until the fulfillment of the contingency for which he was retained).

216. *See id.* at 264-65, 267, 721 A.2d at 691-93 (defining "basis" as a category for discharge and requiring an attorney to await the contingency in order to recover). "Thus, 'basis' for an attorney's discharge and 'cause' for the forfeiture of an attorney's compensation are not one and the same." *Id.* at 264, 721 A.2d at 691; *see also supra* notes 75-77 (defining the categories of for cause and without cause).

by the *Skeens* court's application of the New York rule. Under Maryland law today, when an attorney is discharged because a client has a basis to be dissatisfied with an attorney's performance, the attorney must await the occurrence of the contingency in order to recover.[217] In essence, the *Somuah* decision allows courts to apply either the California or the New York rule depending on why the client discharged her attorney.[218] This flexibility inherent in the *Somuah* court's decision promotes the client's interests in that an "immediate cause of action would place a coercive burden on the contingency fee client, who is likely to be of limited means, to pay his former attorney before final determination of the litigation."[219] The California rule, as applied in Maryland, is also preferable in that "the deferred cause of action approach [is] consistent with its objective of promoting the client's ability to terminate the attorney-client relationship."[220] Furthermore, "the harm to the discharged attorney [is] negligible because the attorney would not have benefitted prior to the contingency even under the terms of the discharged contract."[221] In the spirit of the California rule, the *Somuah* court has protected client autonomy by allowing clients to discharge unsatisfactory attorneys without imposing an insurmountable burden of repayment until after a judgment or settlement has occurred.[222] Furthermore, the court's holding does not foreclose the attorney's recovery—it merely delays his compensation until settlement or the successful completion of the lawsuit for which he was originally retained.[223]

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217. *Id.* at 267, 721 A.2d at 693 (holding that "where any fee is contingent on recovery by the client and where . . . there has been some basis for the client being dissatisfied with the attorney, the contingency generating the fee must occur prior to the attorney's recovery").

218. *Id.*

219. Craig B. Glidden, Note, *Contracts—Attorney Fees—Right To Recovery Upon Discharge Without Cause*—Rosenberg v. Levin, 7 Fla. L.W. 6 (1982), 10 FLA. ST. U.L. REV. 167, 178 (1982).

220. *Id.* (internal footnote omitted) (discussing *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982)).

221. *Id.* (internal footnote omitted) (discussing the *Rosenberg* case).

222. *See Somuah*, 352 Md. at 264-65, 721 A.2d at 691 (contemplating both the attorney and client's interests).

223. *Id.* at 267, 721 A.2d at 693 (holding that Flachs must await the occurrence of the contingency to recover). The decision, however, does not mention "whether the preclusion of any immediate action to recover the reasonable value of the discharged attorney's services also precludes efforts to impose an equitable lien on the client's future recovery." By allowing a lien that "attaches only to a settlement or judgement favorable to the client" the court could have established a reasonable compromise—allowing Flachs to recover for her services and Somuah to proceed with an attorney she felt more comfortable with. *See* Glidden, *supra* note 219, at 180.

While awaiting the occurrence of the contingency may seem somewhat unfair to the attorney because recovery is dependent on the work of subsequent counsel, it should not be forgotten that the subsequent attorney also shares an interest with the discharged attorney in that without winning the case, or gaining a favorable settlement in the instance of a contingency agreement, he himself will not be compensated.[224] The *Somuah* decision assures that attorneys must remain accountable and attentive to their clients or risk the chance of being discharged and having to wait for the fulfillment of the contingency based on another attorney's performance.[225] In this regard, the decision therefore raises the standard for attorneys by insisting that they attend to their client or lose the chance to represent them and be paid for doing so.[226] Notwithstanding some of the uncertainty caused by the decision, for policy reasons, the *Somuah* holding is preferable to prior Maryland law governing sovereign attorney-client retainer agreements.

The *Somuah* decision also relates to the larger issue of attorney-client fee arrangements and contingency contracts.[227] Contingency fee arrangements allow indigent clients access to attorneys because typically poorer clients cannot finance litigation under any other arrangement.[228] The *Somuah* decision thus empowers indigent clients by establishing a mechanism whereby a client can terminate an attorney they are reasonably dissatisfied with, without incurring a substantial burden of having to pay the attorney in *quantum meruit* immediately after discharge.[229] Although the *Somuah* decision man-

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224. *See supra* notes 51-53 and accompanying text (citing reasons for adopting the New York rule).

225. *See* Fracasse v. Brent, 494 P.2d 9, 14 (Cal. 1972) (citing the client's interests for adopting the California rule).

226. *Id.* (arguing that the loss of trust between an attorney and client may result in an attorney losing a chance to recover compensation for the work completed prior to his termination).

227. *See infra* notes 229-230 (explaining the *Somuah* decision in relation to contingency agreements).

228. *See Fracasse*, 494 P.2d at 14 (stating that contingency agreements are vital to persons of lesser means to help pay for litigation).

229. *Id. But see* Skeens v. Miller, 331 Md. 331, 343-44, 628 A.2d 185, 191 (1993) (holding that a client must recompense his attorney immediately upon discharge when terminated without cause). On the other hand certain attorneys may not accept clients on contingency agreements to avoid a situation like *Somuah*. In this respect, the *Somuah* decision lowers the pool of available attorneys to those clients whose only hope of representation is through a contingency agreement. Furthermore, attorneys may be leery to accept clients on a contingency basis because they could be discharged "on the courthouse steps" without guarantee of reimbursement for costs incurred. *See* Morrow, *supra* note 33, at 686-87 (citing a possible increase in fees because of times when an attorney may not have recovered, the potential for the discouraging of a vigorous pursuit of a client's interests and attorney's

dates an intense factual inquiry by adding another level of analysis requiring the court to gauge the subjective and personal reasons given by the client when discharging her attorney, the benefits to the client and the flexibility awarded to the court arguably outweigh these concerns.[230]

c. Narrow Definition of Law.—

(1) Departure from Precedent.—For the court to conclude that Flachs did not commit serious misconduct and thereby potentially precluding him from recovery,[231] the court decided he was not practicing law in Maryland and therefore did not commit serious misconduct as suggested by Somuah.[232] The *Somuah* court established a curiously narrow definition of the practice of law by ruling that because Flachs did not "expressly hold 'himself out to the public as an attorney engaged in the general practice of law in Maryland,' and did not maintain his principal office in Maryland" he was not practicing law.[233] This very narrow definition of the practice of law is inconsistent with other Maryland decisions that define the practice of law in Maryland as "[u]tilizing legal education, training, and experience . . . [to apply] the special analysis of the profession to a client's problem."[234] The Court of Appeals has even held that "meeting with prospective clients may . . . constitute the practice of law because 'the very acts of interview, analysis and explanation of legal rights constitute practicing law in Maryland.'"[235]

Somuah's narrow definition of practicing law appears to be at odds with the policy goals that the court itself cited.[236] The prohibition of the unauthorized practice of law acts as a means "to protect

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fear of not being compensated as support for allowing an attorney to seek recovery immediately upon termination).

230. *See Fracasse*, 494 P.2d at 14 (citing reasons for adopting the California rule). On the other hand, the case-by-case nature of the *Somuah* analysis may result in the failure to identify a working precedent. *See supra* notes 210-211 (arguing that *Somuah* did not establish an effective workable standard).

231. *See supra* notes 70-74 (citing that an attorney that engaged in serious misconduct may forfeit his right to recovery).

232. *Somuah*, 352 Md. at 264, 721 A.2d at 691.

233. *Id.* at 262, 721 A.2d at 690 (quoting Kennedy v. Bar Ass'n of Montgomery County, 316 Md. 646, 659, 561 A.2d 200, 207 (1989)).

234. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Kennedy*, 316 Md. at 662, 561 A.2d at 208); *see also supra* notes 95-100 (offering additional theories on defining the practice of law).

235. *Somuah*, 352 Md. at 262, 721 A.2d at 690 (alteration in original) (internal quotation marks omitted) (citing Attorney Grievance Comm'n v. James, 340 Md. 318, 324, 666 A.2d 1246, 1248 (1995) (quoting *Kennedy*, 316 Md. at 666, 561 A.2d at 210)).

236. *See infra* note 246 and accompanying text (citing policy reasons behind prohibiting the unauthorized practice of law).

the public from being preyed upon by those not competent to practice law—from incompetent, unethical, or irresponsible representation."[237] Furthermore, a narrow definition is also in disagreement with the state code and professional rules that prohibit the practice of law.[238] These laws and rules make clear, along with the supporting case law, that the unauthorized practice of law is illegal in Maryland.[239] By cursorily dismissing the prospect that Flachs was practicing law, despite its strong opposition to the unauthorized practice, the court avoids the issue of whether he conducted serious misconduct,[240] which would have precluded Flachs from recovering his fees and expenses.[241]

Flachs prepared documents and counseled Somuah regarding her potential claim.[242] He collected and preserved evidence, namely the demolished taxicab, and obtained confidential information in the form of medical reports.[243] Finally, Flachs secured national experts, interviewed potential witnesses, and met with Somuah on at least six occasions.[244] While all of these activities appear as the practice of law based on previous decisions,[245] the court chose to apply a very narrow definition of the practice of law as an attorney holding himself out to the public as a member of the Maryland Bar or as having a law office in the state.[246] Essential to this discussion is that Flachs completed his work on Somuah's behalf. Although this information is absent from the record it is implied and can be inferred that much of Flachs's work was in fact done in Maryland. There is no evidence on the record to suggest that Flachs met with Somuah, collected and presented evidence, and interviewed potential witnesses anywhere other than

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237. *Somuah*, 352 Md. at 261-62, 721 A.2d at 690 (internal quotation marks omitted) (quoting *In re* Application of R.G.S., 312 Md. 626, 638, 541 A.2d 977 (1988)).

238. *See supra* notes 78-93 (citing the Maryland Code, Rules of Professional Conduct, and Rules Governing Admission to the Bar that prohibit the unauthorized practice of law).

239. *See* MD. CODE ANN., BUS. OCC. & PROF. §§ 10-601, -602, -606 (prohibiting the unauthorized practice of law in Maryland without a license); RULES GOVERNING ADMISSION TO BAR OF MARYLAND RULE 14 (requiring an out-of-state attorney to be specially admitted to practice in Maryland); MARYLAND LAWYERS RULES OF PROFESSIONAL CONDUCT Rule 5.5, 7.1, 8.5 (prohibiting the unauthorized practice of law and explaining the consequences of such); *see also In re* Application of R.G.S., 312 Md. 626, 627, 541 A.2d 977, 978 (1988) (recognizing the prohibition of the unauthorized practice of law in Maryland).

240. *See id.* at 262, 721 A.2d at 690 (stating that Flachs "investigation" did not constitute the unauthorized practice of law in Maryland).

241. *See supra* notes 72, 74 and accompanying text (stating that an attorney who commits serious misconduct may not recover).

242. *See Somuah*, 352 Md. at 272, 721 A.2d at 695 (Rodowsky, J., dissenting).

243. *See id.*

244. *See id.*

245. *See supra* notes 99-100 and accompanying text (defining the practice of law).

246. *See supra* note 233 and accompanying text (defining narrowly the practice of law).

Maryland.[247] It also can be inferred, however, that Flachs most likely prepared documents and made necessary phone calls for Somuah's case from his office in Virginia.[248] In finding that Flachs was not practicing law, and failing to conclude that any of his activities resulted in serious misconduct, the court permits substantial leeway for both out-of-state and in-state practitioners not licensed in Maryland to perform legal services for unsuspecting clients.

Instead of strongly discouraging out-of-state attorneys from practicing law in Maryland without a license, the court attempted to strike a balance to assure that Somuah could discharge her attorney without a severe financial burden, and that Flachs was reasonably compensated for the services he performed.[249] In the court's strain to compromise,[250] it created an unsatisfactory, narrow definition of the practice of law; one which easily could be circumvented by both unlicensed out-of-state, and unlicensed in-state attorneys.[251]

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247. *See Somuah*, 352 Md. at 272, 721 A.2d at 695 (describing Flachs's investigation and work done on behalf of Somuah). On the contrary, the court says that Flachs first met with Somuah in Maryland at Prince Georges Community Hospital. *Id.* at 247, 721 A.2d at 683. There is no information, however, that Flachs did any of his work, outside of his initial meeting with Somuah, anywhere other than Virginia. *Id.* at 247, 272, 721 A.2d at 683, 695.

248. *Id.* at 247, 721 A.2d at 695 (describing Flachs's investigation of Somuah's cause of action).

249. *Somuah*, 352 Md. at 264-65, 721 A.2d at 691 (stating that "we strike a balance between the client's absolute right to discharge his or her attorney and the attorney's right to fair compensation for services competently rendered prior to discharge"); *see also* D.P. Grawunder, *Right Of Attorney Admitted In One State To Recover Compensation For Services Rendered In Another State Where He Was Not Admitted To The Bar*, 11 A.L.R.3d 907, 908 (1999). Grawunder stated:

> Most courts take the view that in the absence of some extenuating circumstance, an out-of-state attorney who renders services locally falls within the prohibition against illegally practicing law and cannot recover compensation from his client for the local services. On the other hand, recovery has been allowed in a few instances, especially where it appeared that before undertaking to represent a client, the attorney made a full disclosure of his lack of qualification in the local state, and the client nonetheless agreed to the retainer. Of course, if the services rendered by the out-of-state attorney do not involve courtroom appearances or actual litigation, he may be found not to have been illegally "practicing law" and may accordingly be allowed his fee, but some courts have denied recovery even though it did not appear that the attorney's services consisted in the pursuit of actual adversary litigation.

Id.

250. The exceptional circumstances of the case may have motivated the court to compromise. *See infra* note 271 (detailing some of the unique circumstances, i.e., the potential for a federal lawsuit and Somuah's change of residency from Maryland to Virginia).

251. *See supra* note 233 and accompanying text (stating that Flachs did not practice law in Maryland because he did not have an office in the state or because he did not falsely state he was licensed to practice in Maryland).

(2) The Birbrower *Solution.*—Arguably, a more reasonable way to determine if an out-of-state attorney practiced law in a jurisdiction where he was not licensed is the "sufficient contact" test cited in *Birbrower.*[252] The *Birbrower* "sufficient contact" test provides that an unlicensed attorney is practicing law in a jurisdiction where he is not licensed if he engages in "sufficient activities in the state, or created a continuing relationship with the . . . client that included legal duties and obligations."[253] Applying this framework to the instant case, by entering into an agreement to represent Somuah,[254] and beginning an investigation that eventually resulted in over $20,000 in fees and expenses,[255] Flachs arguably engaged in "sufficient activities in the state" and created "legal duties and obligations" by establishing a "continuing relationship"[256] with Somuah. Flachs's relationship with Somuah and the services he performed for her in Maryland could surely satisfy the "sufficient contact" test.[257] In short, under the *Birbrower* "sufficient contact" analysis, Flachs practiced law in Maryland without a license, thereby giving rise to serious misconduct.[258] Unlike Maryland law prior to *Somuah* that prohibited compensation for serious misconduct, the solution offered in *Birbrower* would not prevent Flachs from recovering some compensation for his representation of Somuah.[259]

The Supreme Court of California reasoned that while "Birbrower's statutory violation may require exclusion of the portion of the fee attributable to the substantial illegal services, . . . that violation does not necessarily entirely preclude its recovery under the fee agree-

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252. *See supra* note 124-125 and accompanying text (defining the 'sufficient contact' test). This analysis limits the shaping and reshaping of the definition of practicing law by simply inquiring whether the attorney had sufficient contact with a client in the state that created legal duties.

253. Birbrower v. Superior Court of Santa Clara County, 949 P.2d 1, 5 (Cal. 1998).

254. *Somuah*, 352 Md. at 247, 721 A.2d at 683.

255. *Id.* at 249, 721 A.2d at 683.

256. *Birbrower*, 949 P.2d at 5-6 (defining "sufficient contact"); *see also supra* notes 248-249 and accompanying text (discussing the services Flachs performed for Somuah and in what state, Maryland or Virginia).

257. *See id.* Applying the sufficient contact test to the Somuah-Flachs relationship indicates a "continuing relationship" that resulted in legal duties and obligations on behalf of Flachs. This relationship is key to the "sufficient contact" analysis in *Birbrower. Id.*

258. *See Birbrower*, 949 P.2d at 5-6 (emphasizing that a range of activities, including "sufficient contact" and a "continuing relationship" with an in-state client would result in the practice of law in a state using a "sufficient contact" test).

259. *See id.* at 13 (allowing an attorney who practiced law without a license and therefore forfeited the portion of the fee attributable to those illegal services, to recover under the fee agreement for the limited services he performed outside the jurisdiction where he was not licensed).

ment for the limited services it performed outside California."[260] Furthermore "to the extent that the illegal compensation can be severed from the rest of the agreement," the portion of the fee agreement between the attorney and the client that includes payment for services rendered in New York may be enforceable.[261] The *Birbrower* court then remanded the case so the trial court could separate "the value of the California services" from the rest of the fee agreement and determine "how much of this sum is attributable to services Birbrower rendered in New York" and compensate Birbrower in that amount.[262]

Applying the *Birbrower* framework to the instant case, Flachs would be compensated for those services he performed in Virginia, the state where he was licensed.[263] Further, Flachs would be denied compensation for any work that he performed in Maryland, because under the "sufficient contact" analysis Flachs would be practicing law without a license in Maryland, constituting serious misconduct.[264] If the Court of Appeals of Maryland were to adopt the California "sufficient contact" test, Flachs could recover compensation for the services he performed in Virginia despite having illegally practiced law in Maryland.[265] Perhaps, this would not result in a substantial recovery for Flachs if a more thorough factual inquiry proved most of his work was performed in Maryland.[266] Nevertheless, such a ruling would result in a broader definition of the practice of law in Maryland, thereby allowing the court to police all Maryland attorneys, and all attorneys working in Maryland.[267] This class of attorneys includes all those who created a legal duty and obligation with a Maryland client through sufficient contact,[268] not just simply those attorneys with an office in

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260. *Id.* (citing Calvert v. Stoner, 199 P.2d 297, 300-01 (Cal. 1948)).

261. *Id.*

262. *Id.*

263. More factual analysis would be necessary to determine exactly what Flachs did out of his office in Virginia and what services he performed for Somuah in Maryland. While the "sufficient contact" test lends itself to be somewhat arbitrary in that Flachs is compensated for services depending on bordering state boundaries, the analysis prevents Flachs from receiving compensation for the unauthorized practice of law. *See supra* note 261 and accompanying test (defining "sufficient contact").

264. *See infra* note 266 and accompanying text (citing the *Birbrower* holding and applying its holding to *Somuah*).

265. *Id.*

266. *See Somuah*, 352 Md. at 272, 721 A.2d at 695 (Rodowsky, J., dissenting) (providing limited details of the Flachs investigation).

267. *See supra* note 78 and accompanying text (stating that it is the court's duty to regulate the state's attorneys).

268. *See supra* note 252 and accompanying text (defining the sufficient contact test).

the state or those who claim to be Maryland attorneys.[269] Under the *Somuah* court's unsatisfying definition of practicing law, an unlicensed attorney in Maryland—both out-of-state attorneys or in-state unlicensed attorneys—could render advice, complete an investigation, and seemingly perform any out-of-court representation with impunity as long as the attorney neither had an office in Maryland nor held himself out as a Maryland attorney.[270] Finally, the *Birbrower* solution offers a compromise by allowing the court to award compensation to an attorney for the lawful work he completed in his licensed jurisdiction and denying compensation for work performed in jurisdictions where he was not licensed.

The instant case, does in some respects, contain exceptional circumstances. For example, Somuah lived in Virginia when Flachs was retained, and the attorney began his investigation with the reasonable notion that he was going to file Somuah's case in federal court, where he was admitted to practice.[271] Because the client moved from Virginia to Maryland, the court could arguably have concluded that Flachs's conduct was simply an investigation and not the practice of law.[272] By the court's term, the distinction between an investigation and the practice of law is paramount because if Flachs was determined to be practicing law in Maryland without a license this would constitute serious misconduct and preclude recovery. Instead of emphasizing this key fact, the court chose to create a general, yet narrow, definition of the practice of law.[273] A better approach would have been to compensate Flachs for the initial fees incurred while Somuah was in Virginia and disallow those expenses incurred in Maryland.[274]

5. Conclusion.—In *Somuah v. Flachs,* the Court of Appeals found that an attorney discharged because a client had a valid basis to be dissatisfied must await the contingency to be compensated. The court

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269. *See supra* note 233 and accompanying text (defining the practice of law in Maryland as holding yourself out as an attorney or maintaining an office in the state).

270. *Id.*

271. *See Somuah,* 352 Md. at 256, 721 A.2d at 687 (stating it was not immediately clear where Flachs would file the suit, in federal or in state court).

272. *See id.* at 256-57, 266, 721 A.2d at 687, 692 (detailing Flachs's investigation and asserting that Somuah would benefit from Flachs's work despite failing to find that he had practiced law).

273. *See supra* note 233 and accompanying text (defining the practice of law in Maryland as holding yourself out as an attorney or maintaining an office in the state).

274. *See* Birbrower v. Superior Court, 949 P.2d 1, 13 (Cal. 1998) (separating an attorney-client fee agreement into two parts by denying the attorney compensation for services rendered in violation of an unauthorized practice of law statute and allowing recovery for services that were performed in the jurisdiction where the attorney was licensed to practice).

came to this conclusion by establishing a narrow definition of the practice of law, which included having an office in the state and holding oneself out to the public as an attorney. While the court's definition of the practice of law is unsatisfying, its holding allows the court flexibility in determining when a discharged attorney can recover if terminated prior to the contingency; either immediately upon discharge or only upon fulfillment of the contingency depending in why the attorney was discharged. If the client has an adequate reason by the court's determination, the attorney must await the occurrence of the contingency, if the attorney is discharged without cause, he may recover immediately. In sum, the flexibility established by the court's ruling will help protect both the clients' interests by not burdening them with legal fees after discharging an under-performing attorney while also protecting the attorney's right to recover if he was discharged without cause.

JACOB J. HERSTEK

XIII. TORTS

A. *Maryland's Adoption of Pre-Impact Fright as a Legally Compensable Element of Damages*

In *Benyon v. Montgomery Cablevision, L.P.*,[1] the Court of Appeals, in a case of first impression, permitted recovery in a survival action for the mental anguish a decedent suffered in apprehension of his fatal impact with another vehicle.[2] The court held that "in survival actions, where a decedent experiences great fear and apprehension of imminent death before the fatal physical impact, the decedent's estate may recover for such emotional distress and mental anguish as are capable of objective determination."[3] In so deciding, the court, for the first time, acknowledged "pre-impact fright" as a legally compensable element of damages in a survival action.[4] The court's decision to allow the recovery of damages for pre-impact fright preserves the policy goals of the "physical injury" rule adopted in *Green v. T.A. Shoemaker & Co.*,[5] and modified in subsequent cases.[6] This decision, however, represents a deviation from the principle prohibiting the award of compensatory damages based upon speculative or conjectural evidence.[7]

1. The Case.—On the night of June 7, 1990, Montgomery Cablevision discovered that one of its transmission cables located at Interstate 495 required repair.[8] To repair and re-position the cable, the repairpersons needed unobstructed access across the heavily traveled Interstate.[9] To facilitate this repair, the Maryland State Police stopped traffic on both sides of I-495 in the early morning hours of June 8, 1990, for approximately thirty to forty-five minutes pursuant to a permit obtained by Montgomery Cablevision from the Maryland State Highway Administration.[10] During that time, a one-mile back up

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1. 351 Md. 460, 718 A.2d 1161 (1998).

2. *Id.* at 464, 718 A.2d at 1163.

3. *Id.*

4. *Id.* at 463, 718 A.2d at 1163 (internal quotation marks omitted) (observing that "[w]hether 'pre-impact fright' . . . is a legally compensable element of damages in a survival action is an issue hitherto unaddressed by this Court").

5. 111 Md. 69, 83, 73 A. 688, 693 (1909) (rejecting "the rigid rule applied in some Courts, requiring actual contemporaneous physical impact producing physical injury" in favor of compensating injury to one's health brought on by fright without physical impact).

6. *See infra* notes 50-75 and accompanying text (describing the evolution of the physical injury rule).

7. *See infra* note 34 and accompanying text (citing cases that follow this principle).

8. *See Benyon*, 351 Md. at 464, 718 A.2d at 1163.

9. See Montgomery Cablevision, L.P. v. Benyon, 167 Md. App. 363, 369, 696 A.2d 491, 493 (1997).

10. *See Benyon*, 351 Md. at 464, 718 A.2d at 1163.

formed on both sides of I-495.[11] At the rear of the back up, one of the co-defendants, a truck driver stopped his tractor-trailer upon approaching the congestion on the westbound side of I-495.[12] Douglas Benyon (decedent) was also traveling westbound in the same lane as the truck driver within the fifty-five miles per hour speed limit.[13] According to evidence presented at trial, Benyon became aware and reacted to the impending danger of the stopped traffic ahead of his van approximately one hundred ninety-two feet from the rear of Kirkland's tractor-trailer.[14] Benyon's van skidded for approximately seventy-one and one-half feet and veered slightly to the right before colliding with the rear of Kirkland's tractor-trailer at forty-one miles per hour.[15] Benyon died instantly upon impact.[16]

Benyon's estate filed a wrongful death and a survivorship action,[17] naming Montgomery Cablevision, the truck driver and the owner of the tractor-trailer[18] as defendants.[19] The jury returned a verdict in favor of Benyon's estate.[20] Among the damages awards, Benyon's estate received a $1,000,000 damage award for the decedent's pre-impact fright,[21] which was reduced by the trial judge to

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11. *See id.*

12. *See id.*

13. *See id.* at 464-65, 718 A.2d at 1163.

14. *See id.* at 465, 718 A.2d at 1163.

15. *See id.*

16. *See id.*

17. The differences between a wrongful death action and a survivorship action are explained in an opinion by Chief Judge McSherry in *Stewart v. United Electric Light & Power Co.*, 104 Md. 332, 65 A. 49 (1906):

> Under . . . [the wrongful death statute,] the damages recoverable are such as the equitable plaintiffs have sustained *by the death* of the party injured; under [the survivorship statute,] the damages recoverable are only such as the deceased sustained in his lifetime and consequently excluded those which result to other persons from his death. Under . . . [the wrongful death statute,] the damages are apportioned by the jury among the equitable plaintiffs, and belonging exclusively to them and form no part of the assets of the decedent's estate; under . . . [the survivorship statute,] the damages recovered go into the hands of the executor or administrator and constitute assets of the estate. Under . . . [the wrongful death statute,] there is no survival of a cause of action the cause of action is created by it and is a new cause of action and consequently one which the deceased never had; under [the survivorship statute,] there *is* a survival of a cause of action which the decedent had in his lifetime.

Id. at 339-40, 65 A. at 52 (internal citations omitted).

18. The insurance carrier for the tractor-trailer intervened as a defendant. *See Benyon*, 351 Md. at 465, 718 A.2d at 1163.

19. *See id.*

20. *See id.* at 466, 718 A.2d at 1164.

21. *See id.* The jury was instructed by the trial judge "that it could consider and make award for 'pain, suffering, and mental anguish' that the decedent experienced before the crash." *Id.* (citation omitted).

$350,000 pursuant to a statutory limitation on the amount of noneconomic damage awards.[22]

In a two-to-one decision, the Court of Special Appeals vacated the jury's award of damages for the decedent's pre-impact fright.[23] The court recognized the fact "[t]hat there has not previously been any recovery for pre-impact fright in a survival action is not a basis for concluding that there can never be an appropriate set of facts and circumstances that would permit a tort victim to recover damages for such emotional distress."[24] Reasoning that no recovery can be permitted without physical injury or injury capable of objective determination, the majority held that decedent's estate could not recover damages because a person "who died instantly upon impact or . . . without recovering consciousness following impact cannot have suffered any injury capable of objective determination as a *result* of pre-impact fright."[25]

The Court of Appeals granted certiorari[26] to determine "[w]hether 'pre-impact fright,' or any other form of mental and emotional disturbance or distress, suffered by an accident victim who dies instantly upon impact is a legally compensable element of damages in a survival action."[27]

2. Legal Background.—

a. Maryland's Survivorship Statute.—Originally, at common law, when a victim of a tort died prior to recovery, the cause of action expired with the victim's death.[28] Therefore, the victim's estate could not bring an action to recover compensatory damages for injuries suffered on the decedent's behalf.[29] In 1888, however, the Maryland General Assembly enacted a survivorship statute permitting a cause of action to survive a claimant's death,[30] now codified as section 7-401(x)

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22. *See id.* Section 11-108(b)(1) of Maryland's Courts and Judicial Proceedings Article states, in pertinent part: "In any action for damages for personal injury in which the cause of action arises on or after July 1, 1986, an award for noneconomic damages may not exceed $350,000." MD. CODE ANN., CTS. & JUD. PRO. § 11-108(b)(1) (1998).

23. *See* Montgomery Cablevision, L.P. v. Benyon, 116 Md. App. 363, 403, 696 A.2d 491, 510 (1997).

24. *Id.* at 375, 696 A.2d at 496.

25. *Id.* at 388, 696 A.2d at 503.

26. *See* Benyon v. Montgomery Cablevision L.P., 347 Md. 683, 702 A.2d 291 (1997).

27. *Benyon*, 351 Md. at 463, 718 A.2d at 1163.

28. *See* Stewart v. United Elec. Light & Power Co., 104 Md. 332, 333-34, 65 A. 49, 50 (1906) (noting that at common law a tort claim expired upon the victim's death).

29. *See id.*

30. *See Stewart*, 104 Md. at 335-40, 65 A. at 50-52 (discussing the history of Maryland's survivorship statute).

of the Estates and Trusts Article.[31] Pursuant to section 7-401(x), a personal representative of a claimant's estate may "prosecute . . . a personal action which the decedent might have commenced or prosecuted."[32] Recovery under section 7-401(x) is limited to compensation for the pain, suffering and loss endured by the deceased.[33]

b. Measuring Recovery of Compensatory Damages.—In establishing a correct measure of compensatory damages, Maryland law prohibits the jury's use of speculative and conjectural evidence.[34] In *Asibem Associates, Ltd. v. Rill*,[35] the plaintiff purchased a tract of land from the defendant and later discovered the tract measured approximately ten acres less than the contract specified.[36] After granting summary judgment to the plaintiff on the issue of liability for breach of contract, the court conducted a trial to calculate damages.[37] At trial, the plaintiff attempted to prove damages solely through the testimony of one lay witness.[38] Because the witness failed to support her opinion of the value of the plaintiff's property by comparing it to other properties, the Court of Appeals affirmed the trial court's ruling on the ground that the plaintiff had failed to prove with requisite reasonable certainty that it had suffered compensable damages.[39] The court explained that "Maryland cases are in accord with the prevailing rule elsewhere: that if compensatory damages are to be recovered, they must be proved with reasonable certainty, and may not be based on speculation or conjecture . . . ."[40]

c. The Development of the "Physical Injury" Rule.—Shortly after the turn of the century, the Court of Appeals, for the first time, allowed recovery of damages for physical injuries caused by fright,

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31. MD. CODE ANN., EST. & TRUSTS § 7-401(x) (1998).

32. *Id.*

33. *See id.* (permitting "the commencement of a personal action which the decedent might have commenced or prosecuted"); *see also Stewart*, 104 Md. at 343, 65 A. at 53 (construing the predecessor to section 7-401(x)).

34. *See* Maicobo Inv. Corp. v. Von Der Heide, 243 F. Supp. 885, 893 (D. Md. 1965) (recognizing that under Maryland law "damages must be reasonably certain and may not be based on speculation or conjecture"); Asibem Assocs., Ltd. v. Rill, 264 Md. 272, 276, 286 A.2d 160, 162 (1972) (stating that "if compensatory damages are to be recovered, they must be proved with reasonable certainty, and may not be based on speculation or conjecture").

35. 264 Md. 272, 286 A.2d 160 (1972).

36. *Id.* at 273, 286 A.2d at 161.

37. *See id.*

38. *See id.* at 276, 279, 286 A.2d at 162, 164.

39. *See id.* at 280, 286 A.2d at 164.

40. *Id.* at 276, 286 A.2d at 162.

shock, mental anguish, and other forms of emotional distress without requiring that the victim endure contemporaneous physiological harm. In *Green v. T.A. Shoemaker & Co.*,[41] the first case in Maryland allowing such recovery, the court rejected the "physical impact" rule.[42] That rule, "requiring actual contemporaneous physical impact producing physical injury," was intended to protect against spurious and feigned claims of emotional distress.[43]

In *Green*, the Court of Appeals held that the plaintiff could recover for physical and emotional injuries resulting from fright and nervousness caused by constant demolition and blasting in a rock quarry located next to the plaintiff's house.[44] The court allowed recovery although none of the blasted rocks actually struck the plaintiff.[45] In so holding, the court rejected the more rigid "physical impact" rule, and adopted the "physical injury" rule instead.[46]

The court explained that "when it is shown that a *material physical injury* has resulted from fright caused by a wrongful act . . . in [its] nature calculated to cause constant alarm and terror, it is difficult, if not impossible, to perceive any sound reason for denying a right of action in law, for such physical injury."[47] According to the *Green* decision, emotional distress manifesting itself in the form of a physical injury as a natural result of tortious conduct provides a sufficient guarantee of the authenticity of the claim. While the *Green* court crafted a holding that sanctioned recovery for emotional distress, it did so in a way that protected the policy behind the rejected "physical impact" rule: the prevention of spurious or feigned claims.[48] The court noted that the new "physical injury" rule still protected against feigned claims because it still required that the physical injury be the "*natural and proximate effect*" of the alarm and terror that the victim endured.[49]

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41. 111 Md. 69, 73 A. 688 (1909).

42. *Id.* at 83, 73 A. at 693.

43. *Id.* at 77, 83, 73 A. at 691, 693 (noting that the rule protected against fictitious litigation).

44. *Id.* at 83, 73 A. at 693.

45. *See id.* at 79, 83, 73 A. at 692, 693.

46. *Id.* at 77, 73 A. at 691.

47. *Id.*

48. *Id.* at 81, 73 A. at 693 (requiring that the injury be the natural proximate cause of the tortious act).

49. *Id.* at 78, 73 A. at 691 (emphasis added) (citing Baltimore City Passenger Railway Co. v. Kemp, 61 Md. 80 (1883)). The Court explained:

> It must be conceded that the numerical weight of authority supports the general rule that there can be no recovery for nervous affections unaccompanied by contemporaneous physical injury, but the sounder view, in our opinion, is, (sic) that there are exceptions to this rule, and that where the wrongful act complained of is the proximate cause of the injury . . . and where the injury ought, in the light of

Several Court of Appeals's decisions rendered after *Green* also rejected the "physical impact" rule, while modifying the "physical injury" rule espoused in *Green*. In *Bowman v. Williams*,[50] the plaintiff, standing in his first floor dining room, witnessed a truck driven by the defendant veer out of control and crash into the lower level of his house.[51] The plaintiff was not hit by the truck nor knocked to the ground by its impact with the house.[52] Nevertheless, overcome by fear for his safety and that of his children, he collapsed to the floor.[53] The plaintiff, bedridden for two weeks, suffered from severe emotional distress, nervousness, and weakness.[54] In affirming the trial court's disposition awarding the plaintiff damages for his emotional injuries that arose from fright, the Court of Appeals reaffirmed that

> a plaintiff can sustain an action for damages for nervous shock or injury caused, without physical impact, by fright arising directly from defendant's negligent act or omission, and resulting in some clearly apparent and substantial physical injury, as manifested by an external condition or by symptoms clearly indicative of a resultant pathological, physiological, or mental state.[55]

The court further supported its holding by reasoning:

> In fright a man's whole being reacts. The shock to his nervous system is reflected in instinctive excitement and intensive action of the muscles and organs of the body, and so it is clear that the mental state has a corresponding physical accompaniment, although there has been no impact suffered.[56]

The court's ruling reaffirmed the policy judgment expressed in *Green*, that claims of physical injuries resulting from fright and fear are viable in spite of the possibility they could be simulated or spurious.[57] The unanimous ruling stated that such "difficulties are common, are sur-

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> all the circumstances, to have been contemplated as a natural and probable consequence thereof, the case falls within the exception and should be left to the jury.

Id. at 81, 73 A. at 692.

50. 164 Md. 397, 165 A. 182 (1933).

51. *Id.* at 398-99, 165 A. at 182.

52. *See id.* at 399, 165 A. at 182.

53. *See id.*, 165 A. at 182-83.

54. *See id.*

55. *Id.* at 404, 165 A. at 184.

56. *Id.* at 401, 165 A. at 184.

57. *See* Green v. T.A. Shoemaker & Co., 111 Md. 69, 81, 73 A. 688, 692 (1909) (noting that it is as easy to feign a nervous injury resulting from actual physical impact as it is to feign one arising from fright without physical impact).

mountable, and so should not prevent the operation of the general and fundamental theory of the common law that there is a remedy for every substantial wrong."[58]

In *Vance v. Vance*,[59] the Court of Appeals clarified and explained the "physical injury" rule as set forth in *Bowman*. In *Vance*, the plaintiff suffered from nervousness, insomnia, spontaneous crying, and other symptoms of emotional distress as a consequence of learning that her marriage was a nullity because the defendant, whom she thought she wed almost twenty years prior, had not finalized his divorce from his first wife until after his wedding with the plaintiff.[60] The defendant argued that the plaintiff's injuries did not constitute the requisite physical injury under *Bowman*.[61] The court explained that "physical injury" resulting from emotional distress could be proven in one of four ways, all designed to guard against feigned claims by requiring objective evidence of injury.[62] According to the court, the first three categories of "physical injury" resulting from emotional distress were "manifestations of a physical injury through evidence of an external condition or . . . symptoms of a pathological or physiological state."[63] Additionally, a plaintiff could show "physical injury" by evidence indicative of a "mental state."[64] The court explained that in the context of the *Bowman* rule's requirement of a "physical injury," the word physical is not used in its ordinary dictionary sense, but is used to indicate that the injury for which recovery is sought must be capable of objective determination.[65] Reasoning the plaintiff in this case had "suffered an objectively manifested, definite nervous disorder of a magnitude similar to the mental distress established in *Green* [and] *Bowman*," the *Vance* court upheld the jury finding that the plaintiff was physically injured "as a foreseeable result of [defendant's] negligent misrepresentation concerning his marital status."[66]

While the Court of Appeals's decisions following *Green* have facilitated the recovery of damages for emotional distress, the court has limited the recovery for emotional distress to the mental distress that

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58. *Bowman*, 164 Md. at 404, 165 A. at 184.

59. 286 Md. 490, 408 A.2d 728 (1979).

60. *See id.* at 493-95, 408 A.2d at 729-30.

61. *See id.* at 495, 408 A.2d at 731 (arguing that claims based only on emotional distress were not legally compensable under *Bowman*).

62. *See id.* at 500, 408 A.2d at 733.

63. *Id.*

64. *Id.*

65. *See id.*

66. *Id.* at 501, 408 A.2d at 734.

the victim experiences during a "reasonable window of anxiety."[67] In *Faya v. Almaraz*,[68] the Court of Appeals reversed a trial court's decision to dismiss the complaints of two plaintiffs seeking relief for emotional and mental distress[69] resulting from the defendant surgeon's negligent failure to disclose his HIV-positive status before performing surgery on them.[70] The plaintiffs alleged that they continued to suffer emotional and mental distress more than a year after they tested negative for the virus.[71] Relying on *Vance* and its precursors, the court ruled that the plaintiffs could recover for the symptoms they had alleged "to the extent that they can objectively demonstrate their existence."[72] The court, however, determined that the plaintiffs' continued fear of contracting AIDS after they tested HIV-negative could be deemed unreasonable, because the possibility of their contracting AIDS from the defendant had become extremely unlikely.[73] Therefore, the court concluded that "[the plaintiffs] may only recover for their fear and its physical manifestations which may have resulted from . . . [defendant's] alleged negligence for the period constituting *their reasonable window of anxiety*."[74] The court described this window as "the period between which they learned of [the defendant's] illness and received their HIV-negative results."[75]

In light of the development of the "physical injury" rule in *Green* and its progeny, it appears that a plaintiff in Maryland must satisfy three requirements to recover for purely psychological injury resulting from the tortious conduct of another. First, the tortious conduct of the defendant must proximately cause the victim's emotional dis-

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67. *See* Faya v. Almaraz, 329 Md. 435, 455-56, 620 A.2d 327, 337 (1993) (limiting recovery for alleged injuries occurring outside of the time frame in which they could reasonably be suffered).

68. 329 Md. 435, 620 A.2d 327 (1993).

69. The plaintiffs, two patients of the defendant surgeon, alleged "they were put in fear of having contracted HIV and thereby suffered the derivative consequences of that fear, which were manifested by emotional and mental distress, headaches, [and] sleeplessness." *Id.* at 451, 620 A.2d at 334.

70. *Id.* at 450-51, 620 A.2d at 334.

71. *See id.* at 455, 620 A.2d at 337 (noting that the plaintiffs' alleged emotional and mental distress continued after they received negative HIV test results, which was well over a year after their last contact with the defendant).

72. *Id.* at 459, 620 A.2d at 338.

73. *See id.* at 455, 620 A.2d at 337 ("Appellants' continued fear of contracting AIDS may, however, be unreasonable after they tested HIV-negative upon learning of Dr. Almaraz's illness, which was well over a year after their last contacts with the physician."). The court based this conclusion on "current credible evidence of a 95% certainty that one will test positive for the AIDS virus, if at all, within six months after exposure to it." *Id.*

74. *Id.* (emphasis added).

75. *Id.*

tress.[76] Next, the plaintiff must prove that the victim's particular psychological state or mental state is "capable of objective determination."[77] Finally, the plaintiff must prove that emotional distress occurred during a period which the victim legitimately could have suffered such distress.[78]

d. Pre-impact Fright in Other Jurisdictions.—The availability of recovery for pre-impact fright in individual jurisdictions is by no means uniform.[79] Courts, however, throughout the nation, have increasingly expressed willingness to allow recovery for pre-impact fright.[80] Although pre-impact fright claims developed from cases involving airplane disasters, they are increasingly permitted in cases involving car, train, and boating accidents in which the decedent suffered a legally compensable amount of pre-impact fright.[81]

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76. *See* Bowman v. Williams, 164 Md. 397, 402, 165 A. 182, 184 (1933) (stating that the plaintiff's injuries "naturally, directly, and reasonably arose" from the defendant's negligence); Green v. T.A. Shoemaker & Co., 111 Md. 69, 81, 73 A. 688, 692 (1909) (requiring that the defendant's tortious conduct must proximately cause the plaintiff's emotional injuries to obtain recovery).

77. *See* Belcher v. T. Rowe Price Found., Inc., 329 Md. 709, 735, 621 A.2d 872, 885 (1993) (finding that Maryland law allows recovery for purely emotional injuries if such injuries are objectively determinable); Faya v. Almaraz, 329 Md. 435, 457-58, 620 A.2d 327, 338 (1993) (same); Vance v. Vance, 286 Md. 490, 500, 408 A.2d 728, 733 (1979) (same).

78. *See Faya*, 329 Md. at 455-56, 620 A.2d at 337 (requiring that the plaintiff's injuries occur during a "reasonable window of anxiety").

79. *See* Thomas D. Sydnor, II, Note, *Damages for a Decedent's Pre-Impact Fear: An Element of Damages Under Alaska's Survivorship Statute*, 7 ALASKA L. REV. 352, 353-54 (1990) (exploring the disparity of recovery for pre-impact fright among various jurisdictions).

80. *See* Christine Nierenz, *"Why Aren't the Pilots Doing Something?" A Look at the Approaches Courts Use To Handle Claims For Pre-Impact Terror in Airplane Disasters*, 47 DRAKE L. REV. 343, 348-49 (1999). According to Nierenz, while some courts maintain a relaxed physical impact standard—"dust in the eye, or the inhalation of smoke, . . . [o]ther courts take an even more liberal approach, and allow recovery for negligent infliction of serious emotional distress without considering whether the plaintiff incurred any physical injury or illness as a result." *Id.* at 349.

81. *See* Snyder v. Whittaker Corp., 839 F.2d 1085, 1092-93 (5th Cir. 1988) (permitting recovery for pre-impact fear suffered by occupants of a capsized boat before drowning after colliding with an offshore drilling platform); Reid v. Louisiana, 637 So. 2d 618, 628-29 (La. Ct. App. 1994) (allowing recovery for pre-impact fear decedent suffered in a car crash); Nelson v. Dolan, 434 N.W.2d 25, 32 (Neb. 1989) (permitting recovery for pre-impact fear suffered by operator of a motorcycle prior to his collision with an automobile); Thibeault v. Campbell, 622 A.2d 212, 215 (N.H. 1993) (permitting recovery for pre-impact fright suffered by the passenger of a car involved in an automobile accident prior to the collision); Missouri Pacific R.R. Co. v. Lane, 720 S.W.2d 830, 833 (Tex. App. 1986, no writ) (allowing recovery for the pre-impact fright suffered by the operator of a truck prior to being struck by a freight train); Green v. Hale, 590 S.W.2d 231, 237-38 (Tex. Civ. App. 1979, no writ) (allowing recovery for pre-impact fear of a 13-year-old boy killed when truck tires crushed his skull); *see also* Sydnor, *supra* note 79, at 352 (noting that claims for pre-impact fear are increasingly being used as a mode of recovery in automobile accident cases).

(1) Inferring Pre-impact Fright From Circumstantial Evidence.—Recognizing the evidentiary dilemma that direct evidence of the decedent's fright is often taken to the grave, some courts have allowed the jury to infer existence of pre-impact pain and suffering through the use of circumstantial evidence.[82] For example, in *Solomon v. Warren*,[83] the United States Court of Appeals for the Fifth Circuit, applying Florida law, affirmed a district court's verdict awarding compensatory damages to the decedents' families for pre-impact fright despite the lack of direct evidence that the decedents' suffered emotional distress.[84] In *Solomon*, which involved the disappearance of a small plane over the Caribbean, the decedents' estates admitted into evidence the transcript of a radio transmission stating that the plane was out of fuel and the pilot planned to attempt to land the plane at sea and to wait for a rescue.[85] The court affirmed the reasonableness of the jury's inference that the decedents knew of their impending doom, stating that "[w]hile the evidence at trial was silent as to the exact length of the time that the [decedents] were aware of the probability of their impending deaths, nevertheless the inference is reasonable, almost compelling, that they appreciated that possibility."[86]

A similar inference was upheld by the Court of Civil Appeals of Texas in *Green v. Hale*.[87] In *Hale*, the jury relied upon circumstantial evidence to infer that a young boy suffered pre-impact fright immediately prior to his head being crushed by the tires of the defendant's

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82. *See, e.g.*, Solomon v. Warren, 540 F.2d 777, 792-93 (5th Cir. 1976) (affirming that a jury could infer from the circumstances that the decedents suffered mental anguish prior to an airplane's crash); *Hale*, 590 S.W.2d at 237 (observing that "[i]t is well established that the existence of conscious pain and suffering may be established by circumstantial evidence, and further that such suffering may be inferred or presumed as a consequence of severe injuries"); *Reid*, 637 So. 2d at 628-29 (holding that jury could have reasonably inferred that decedent suffered emotional distress based on the presence of skid marks and the fact that the car operated by the decedent careened across traffic before it collided with a tractor trailer); *Nelson*, 434 N.W.2d at 32 (holding that the jury could infer that the decedent apprehended and feared his impending death during the five seconds his motorcycle was dragged by the defendant's car after collision but before being fatally crushed by the car). This approach has not been universally accepted. *See* 3 JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 21.02[4][b] (1999) (noting that "some opponents of the award of damages for preimpact terror have based their opposition on the ground that the proof of terror is circumstantial").

83. 540 F.2d 777 (5th Cir. 1976).

84. *Id.* at 792-93 (acknowledging that "the evidence at trial was silent as to the exact length of time that the Levins were aware of the probability of their impending death," but finding that "the inference is reasonable, almost compelling, that they appreciated the possibility").

85. *Id.* at 782 & n.5.

86. *Id.* at 792.

87. 590 S.W.2d 231 (Tex. Civ. App. 1979).

pickup truck.[88] The thirteen-year-old decedent attempted to exit from the rear of his employer's pickup to retrieve a co-worker's hat that blew off and into the road.[89] While the decedent climbed down from the tailgate of the truck, the defendant put the truck into reverse and began to back up.[90] As a result of the truck's unexpected sudden movement, the decedent lost his balance and fell off, landing behind the vehicle.[91] The reversing wheels crushed the decedent's head, killing him.[92]

Responding to the defendant's argument that the jury's award for pre-impact fright lacked support by sufficient factual evidence, the *Hale* court stated that "the existence of conscious pain and suffering may be established by circumstantial evidence, and further that such suffering may be inferred or presumed as a consequence of severe injuries."[93] The court ruled that the testimony from other passengers in the truck describing the decedent's body position and his attempt to hold on to the truck's tailgate to prevent from falling, and the decedent's intelligence supported an inference that "the inevitability of being crushed by the wheel of the truck must have become apparent to him as he fell to the ground behind the truck."[94]

(2) Courts' Use of Evidence of the Decedent's Behavior Prior to Impact to Infer Pre-impact Fright.—Owing to the fact that decedents do not provide the jury with testimony of the tremendous fright they suffered prior to impact, some courts use evidence of the decedent's behavior prior to impact to provide a sufficient basis to support an inference of fright.[95] In *Thomas v. State Farm Insurance Co.*,[96] the Court of Appeals

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88. *Id.* at 237-38 ("Under the applicable law, the jury could draw a reasonable inference of terror and mental anguish which occupied the last moments of [decedent's] life for their finding and award.").

89. *See id.* at 234.

90. *See id.*

91. *See id.*

92. *See id.*

93. *Id.* at 237 (noting that the applicable rule in Texas is that "[w]here serious bodily injury has been inflicted, some degree of physical and mental suffering is the necessary result; and in such cases the jury [is] authorized, without the direct proof of such suffering, to consider the pain both of body and mind in assessing the amount of damages").

94. *Id.* at 238.

95. *See* Snyder v. Whittaker Corp., 839 F.2d 1085, 1092-93 (5th Cir. 1988) (using eyewitness testimony that the decedent sailor clung to the hull of a capsized boat to infer that the decedent had realized peril and had suffered mental anguish prior to his death); Monk v. Dial, 441 S.E.2d 857, 859 (Ga. Ct. App. 1994) (using evidence that the driver made an evasive maneuver immediately prior to the fatal impact to infer awareness of imminent peril and the resultant fright); Thomas v. State Farm Ins. Co., 499 So. 2d 562, 567 (La. Ct. App. 1986) (using testimony that the decedent passenger had gasped and grabbed the driver's arm before fatal impact to set damage award for pre-impact fright). Some courts,

of Louisiana upheld a pre-impact fright damages award based on testimony describing the decedent's reaction immediately prior to the fatal impact.[97] In *Thomas*, the decedent was a passenger in a car involved in a collision negligently caused by one of the co-defendants.[98] The decedent's son, the driver of the car, testified that immediately prior to impact, the decedent, upon hearing her son exclaim, "Oh, no, mom!," looked up, grabbed her son's arm, and gasped.[99]

Some courts have gone so far as to allow inferences that the decedent suffered pre-impact fright based solely on testimony from witnesses to the accident resulting in the fatality. Georgia's intermediate appellate court allowed recovery based on such an inference in *Monk v. Dial*.[100] In that case, the court held that evidence that the decedent driver unsuccessfully attempted an evasive maneuver before fatally colliding with a tractor-trailer supported an inference that the decedent suffered pre-impact fright.[101] Similarly, in *Snyder v. Whittaker Corp.*,[102] the Fifth Circuit determined that testimony that a human figure, presumably the decedent, clung to the hull of a capsized boat about an hour after its initial impact with a drilling platform was sufficient to support a jury's inference that the decedent suffered severe emotional distress before drowning.[103] In *Snyder*, two men set out on a shrimping expedition, during which their boat collided with a drilling platform.[104] Due to a manufacturing defect, the otherwise harmless impact caused a gaping hole in the vessel.[105] The boat capsized

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however, have required direct evidence that the decedent was aware of impending doom to recover for pre-impact fright. *See, e.g.*, St. Clair v. Denny, 781 P.2d 1043, 1050 (Kan. 1989) (assuming arguendo that the state law allows a claim for pre-impact fright, but affirming the trial judge's directed verdict for the defendant motorist on the grounds that evidence from tire marks left at the scene that showed that the plaintiff had attempted an evasive maneuver to avoid the collision were insufficient to establish fright).

96. 499 So. 2d 562 (La. Ct. App. 1986).

97. *See id.* at 567 (affirming the jury verdict based on the testimony of the driver of the car that the decedent was aware of the impending collision just before she died, but finding that the trial judge abused his discretion in granting a damages award of $15,000, and hence, reducing the amount of the damages award for pre-impact fear to $7500).

98. *See id.* at 563.

99. *Id.* at 567.

100. 441 S.E.2d 857 (Ga. Ct. App. 1994).

101. *See id.* at 859 (noting that "from evidence that the decedent's vehicle veered shortly before the collision, the jury could infer that decedent was aware of the impending crash").

102. 839 F.2d 1085 (5th Cir. 1988).

103. *Id.* at 1092-93 (concluding that the jury could reasonably infer that the decedent experienced compensable emotional distress during his attempt to prevent himself from drowning).

104. *Id.* at 1088.

105. *See id.* at 1088-89.

shortly thereafter.[106] Testimony showed that about forty-five minutes after the boat capsized, an occupant of the drilling platform saw the last glimpse of one of the crewman clinging to the hull of the boat.[107] In response to the defendant manufacturer's objection that the plaintiff did not present sufficient evidence upon which a jury could find pre-death fright, the court ruled that given the testimony, "the jury could reasonably infer that [the decedents] struggled for several hours in the water."[108]

3. The Court's Reasoning.—In *Benyon v. Montgomery Cablevision L.P.*, a four-to-three majority[109] of the Court of Appeals held, as a matter of first impression, that "in survival actions, where a decedent experiences great fear and apprehension of imminent death before the fatal physical impact, the decedent's estate may recover for such emotional distress and mental anguish as are capable of objective determination."[110] The court first conducted a lengthy examination of other courts' decisions regarding the viability of recovery for pre-impact fright in their respective jurisdictions.[111] In examining the persuasive authority, the court concluded that "the cases upholding the recoverability of pre-impact fright as an element of damages are more persuasive and compatible with Maryland law."[112]

Next, the court discussed the establishment and the evolution of emotional distress as a legally compensable element of damages in Maryland, beginning with its decision in *Green v. T.A. Shoemaker & Co.*[113] The court explained that

> damages for mental distress no longer ha[ve] a "parasitic status" and that recovery is not "dependent upon an immediate physical injury accompanying an independently actionable tort." Rather . . . damages for mental and emotional disturbances are recoverable when there has been no physical im-

106. *See id.* at 1088.

107. *See id.* The Coast Guard was unable to rescue the crewmembers, and their bodies were never found. *See id.*

108. *Id.* at 1092-93.

109. The majority was composed of the author of the opinion, Chief Judge Bell, as well as Judges Eldridge, Rodowsky, and Cathell.

110. 351 Md. 460, 464, 718 A.2d 1161, 1163 (1998).

111. *See id.* at 476-97, 718 A.2d at 1169-79 (surveying pre-impact fright claims from jurisdictions across the United States).

112. *Id.* at 497, 718 A.2d at 1179.

113. *Id.* at 497-509, 718 A.2d at 1179-85; *see supra* notes 41-49 and accompanying text (discussing the *Green* decision).

> pact and injury, provided that "the mental state for which recovery is sought is capable of objective determination."[114]

The court concluded that "damages for emotional distress or mental anguish are recoverable in Maryland, provided that it is proximately caused by the wrongful act of the defendant and it results in a physical injury . . . or is capable of objective determination."[115]

The court then addressed the two rationales for denying recovery advanced by the Court of Special Appeals.[116] The Court of Special Appeals had decided, first, that the decedent died instantly upon impact and therefore did not suffer any physical injury capable of objective determination.[117] Second, the Court of Special Appeals concluded that the decedent's fright did not result from, and therefore was not proximately caused by, his physical injuries as required under *Green*.[118]

The Court of Appeals disagreed with both of the lower courts' reasons for denying recovery.[119] The court explained that the physical injury rule adopted in *Green* serves a dual purpose: to establish the genuineness of the claim presented by requiring an objective manifestation of the injury, and to serve as a means of measuring the victim's emotional harm.[120] The decedent's fright in the present case, the court concluded, was accompanied by both physical injury and an objective manifestation.[121] First, the Court of Appeals found that "[t]he physical injuries that accompanied the decedent's pre-impact fright [were] the fatal injuries he sustained as a result of the feared impact—the automobile accident."[122] Second, the court noted that the decedent's fright of his impending death was objectively determinable by the seventy-one and one-half-feet of skid marks deposited by his van's

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114. *Benyon*, 351 Md. at 503, 718 A.2d at 1182 (quoting Belcher v. T. Rowe Price Found., Inc., 329 Md. 709, 733-34, 745, 621 A.2d 872, 884, 889 (1993) (internal citations omitted)).

115. *Id.* at 504-05, 718 A.2d at 1183 (internal citations omitted).

116. *See id.* at 506, 718 A.2d at 1184.

117. *See* Montgomery Cablevision, L.P. v. Benyon, 116 Md. App. 363, 388, 696 A.2d 491, 503 (1997) (concluding that the decedent died instantly upon impact). The Court of Special Appeals explained that "obviously one who died instantly upon impact or . . . without recovering consciousness following impact cannot have suffered any injury capable of objective determination *as a result of* 'pre-impact fright,' i.e., fear terror or mental anguish or distress from anticipation of imminent injury or death." *Id.*

118. *Id.* at 389, 696 A.2d at 503 (noting the lack of evidence capable of objective determination sufficient to prove causation).

119. *See Benyon*, 351 Md. at 506, 718 A.2d at 1184.

120. *See id.* at 506-07, 718 A.2d at 1184.

121. *See id.* at 507, 718 A.2d at 1184.

122. *Id.*

tires and evidence that the decedent attempted to swerve to avoid the impact.[123]

The Court of Appeals also concluded that the fact that the decedent's fright preceded his bodily injuries did not affect causation.[124] The court declared that "[t]he wrongful conduct need only proximately cause the emotional distress or mental anguish, independent of the physical injuries; *the mental disturbance need not result from physical injury.*"[125] As a result, the court concluded that "the automobile crash caused the decedent's fatal injuries, for which a separate cause of action exists, and that the [defendant] is responsible for the emotional disturbance resulting from the crash."[126]

Having rejected the Court of Special Appeals's interpretation of the principles espoused in the "physical injury" rule cases (*Green* and its progeny), the Court of Appeals supported its decision to reinstate the jury's damage award by recalling that the underlying purpose of the Maryland survivorship statute is to allow the decedent's estate to maintain a cause of action the decedent could have pursued had he or she lived.[127] The court concluded that because the decedent would have been able to recover damages for his fright sustained prior to impact had he survived the impact, that statutory purpose dictates that his estate be able to recover these damages on his behalf.[128]

The three remaining judges filed two separate dissenting opinions.[129] The first dissent, written by Judge Chasanow and joined by Judge Raker, adopted the Court of Special Appeals's reasoning.[130] The second dissent, authored by Judge Wilner, agreed with the major-

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123. *See id.* The court noted that a jury reasonably could have inferred from that evidence that the decedent was aware of the impending peril, that he was going to crash, and that he attempted an evasive maneuver to avoid it. *See id.* at 508, 718 A.2d at 1185.

124. *See id.* at 507, 718 A.2d at 1184.

125. *Id.* (emphasis added).

126. *Id.* The court's language is somewhat confusing. It appears to suggest that a defendant is liable if his or her wrongful act causes fright. Of course, the wrongful act precedes both the crash and the fright. It is confusing to say—as the court does—that fright results from the *crash* because the crash occurs *after* the fright.

127. *See id.* at 508, 718 A.2d at 1185.

128. *Id.* The court explained:

> A rule that does not permit a decedent's estate to recover pre-impact fright damages in a survival action would be illogical in view of the fact that a victim who [survived a similar accident] would be entitled to recover damages for the emotional distress he or she suffered before the accident, independent of any physical injury that may have been sustained before, or after the emotional injury.

129. *See id.* at 509, 718 A.2d at 1185 (Chasanow, Raker, and Wilner, JJ., dissenting).

130. *See id.* (Chasanow and Raker, JJ., dissenting). Judges Chasanow and Raker's dissent reads in its entirety: "We respectfully dissent for the reasons so well expressed by Judge Bloom, writing for the Court of Special Appeals in *Montgomery Cablevision v. Benyon*, 116 Md. App. 363, 368-389, 696 A.2d 491, 495-503 (1997)." *Id.*

ity's recognition of an action for the recovery for pre-impact fright, but disagreed solely on whether there was sufficient evidence with which the jury could make a reasonable inference that the decedent had suffered emotional distress.[131]

Judge Wilner argued that the majority failed to recognize the speculative and conjectural nature of the jury's inference that the decedent suffered pre-impact fright.[132] Judge Wilner considered the facts of pre-impact fright cases from other jurisdictions examined by the majority and found most of them to be distinguishable from *Benyon*.[133] Those cases, according to Wilner, "involved circumstances where the decedents were obviously aware of an impending disaster that they, themselves, could do nothing to avert," leaving the decedent's mind to contemplate his or her impending death.[134] Judge Wilner argued that the *Benyon*-type cases differ because when "the person either reacts instinctively or marshals his or her whole being in a supreme effort to control the event, *absent some evidence beyond merely that effort*, it is purely speculative to infer that the decedent was consciously pondering the effects of an impending death."[135] Judge Wilner concluded that the court's support of the jury's attenuated inference, based upon speculative and conjectural evidence, violated the principle that compensatory damages should be calculated with reasonable certainty.[136]

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131. *See id.* at 509-10, 718 A.2d at 1185-86 (Wilner, J., dissenting). Judge Wilner explained that "[i]f there was any substantial evidence that . . . thoughts [such as anticipation of imminent death, worry about the effect of his death on his family, etc.] were, in fact, consuming Mr. Benyon during that second or two [before collision], I would agree that a recovery would be permissible." *Id.* at 511, 718 A.2d at 1186.

132. *See id.* at 511, 718 A.2d at 1186 ("It is rank speculation to conclude that Mr. Benyon was consciously thinking about anything other than stopping his vehicle, or, indeed, that his mind and body were engaged in anything but an instinctive reaction directly entirely at self-preservation, requiring little or no ideation at all.").

133. *See id.* at 510, 718 A.2d at 1186. The cases Judge Wilner distinguished include the following: Haley v. Pan Am. World Airways Inc., 746 F.2d 311 (5th Cir. 1984) (claiming pre-impact fright damages in plane crash); Solomon v. Warren, 540 F.2d 777 (5th Cir. 1976) (same); Shu-Tao-Lin v. McDonnell Douglas Corp., 574 F. Supp. 1407 (S.D.N.Y. 1983) (same); Missouri Pac. R.R. Co. v. Lane, 720 S.W.2d 830 (Tex. Ct. App. 1986) (allowing recovery for pre-impact fright in a train collision with a car). *Benyon*, 351 Md. at 511-12, 718 A.2d at 1186 (Wilner, J., dissenting).

134. *Benyon*, 351 Md. at 511, 718 A.2d at 1186 (Wilner, J., dissenting).

135. *Id.* at 512, 718 A.2d at 1187.

136. *See id.* at 513, 718 A.2d at 1187 (stating that the majority's support of the jury's inference violates the long-established principle that "if compensatory damages are to be recovered, they must be proved with reasonable certainty, and may not be based on speculation or conjecture" (citations omitted)).

4. Analysis.—In *Benyon*, the Court of Appeals, as a matter of first impression, allowed the recovery, in a survival action, for the mental anguish that a decedent had suffered in apprehension of imminent death. The court's adoption of pre-impact fright as a legally compensable element of damages is a logical outgrowth of a line of "physical injury" rule cases beginning with *Green v. T.A. Shoemaker & Co.*[137] The court's result, however, is weakened by its affirmation of the jury's inference that the decedent suffered mental anguish from seventy-one and one-half feet of skid marks and the testimony that the decedent attempted to swerve in avoidance of the impact.[138] As noted by Judge Wilner in his dissent, the court's affirmation of the inference represents a deviation from the principle requiring compensatory damages to be based on reasonable certainty, not on speculation or conjecture.[139]

a. Maryland Jurisprudence Regarding the Recoverability of Emotional Damages and the Court's Adoption of Pre-impact Fright as a Legally Compensable Element of Damages.—During this century, Maryland jurisprudence regarding recoverability for emotional injuries has evolved to allow recovery for objectively determinable emotional distress or mental anguish without a contemporaneous physical impact.[140] The court in *Benyon* recognized the jurisprudential evolution and crafted a well-tailored holding that comports with the apparent requirements to support recovery for purely psychological injury set forth in *Green v. T.A. Shoemaker* and its progeny.[141] These requirements preserve the policy goal inherent in the *Green* line of cases: to provide courts with reasonable assurance of the authenticity of the claims presented.[142]

The Court of Appeals's holding in *Benyon* preserves these three requirements for recovery of emotional injuries. The court held that "in survival actions, where a decedent experiences great fear and ap-

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137. 111 Md. 69, 73 A. 688 (1909); *see also supra* notes 41-47 and accompanying text (discussing the *Green* decision).

138. *See Benyon*, 351 Md. at 511, 718 A.2d at 1186 (Wilner, J., dissenting) (criticizing the majority's inference that the decedent suffered emotional distress); *see also supra* notes 127-132 and accompanying text (discussing Judge Wilner's arguments on this point).

139. *See Benyon*, 351 Md. at 512-13, 718 A.2d at 1187 (Wilner, J., dissenting) (arguing that the majority's inference that the decedent suffered pre-impact fright was based on speculative and conjectural evidence).

140. *See* discussion *supra* Part 2.c (tracing the evolution of Maryland law involving recovery for emotional distress).

141. *See supra* notes 76-78 and accompanying text (identifying and discussing three requirements which need to be satisfied for recovery for emotional distress).

142. *See* Belcher v. T. Rowe Price Found., 329 Md. 709, 735, 621 A.2d 872, 885 (1992) (noting that the requirement that harm suffered be capable of objective determination "provides reasonable assurance that the claim is not spurious").

prehension of imminent death before the fatal physical impact, the decedent's estate may recover for such emotional distress and mental anguish as are capable of objective determination."[143] The first requirement—that emotional distress be "capable of objective determination"—constitutes the last part of this holding. The second requirement—that emotional distress occur "during [a] legitimate window of anxiety"—also appears in the language of the holding. *Benyon* describes such a window by requiring that the "decedent experienc[e] great fear and apprehension of imminent death *before* the fatal physical impact."[144] This requirement is inherently satisfied by all pre-impact fright cases because pre-impact fright cases only support one legitimate window of anxiety, the period between the point in time that the decedent realizes his or her impending demise and the moment of the fatal impact.[145] The *Benyon* holding also embraces the third requirement—that emotional injury be proximately caused by tortious conduct of the defendant. The language "where a decedent experiences *great fear and apprehension of imminent death*" implicitly requires that the decedent is suffering great fear *because of* the realization of imminent death.[146] Under *Green*, emotional injury is proximately caused by tortious conduct if the emotional injury is a natural and probable consequence of such conduct.[147] As the *Benyon* court correctly realized, this determination is not affected by the fact that the injury (fright) occurs before the fatal impact.[148] Instead, as long as the fright is a natural and probable consequence of the wrongful conduct, the decedent can recover for the fright.[149]

b. The Court Should Not Have Upheld the Jury's Inference that the Decedent Suffered Mental Anguish.—Although the court's adoption of pre-impact fright as a legally compensable element of damages comports with Maryland jurisprudence, the court's application of the rule

143. *Benyon*, 351 Md. at 464, 718 A.2d at 1163.

144. *Id.* (emphasis added).

145. *See id.* at 507-08, 718 A.2d at 1185 (stating that the window of anxiety in this case "opened when the decedent became conscious of the fact he was in imminent danger and it closed with his death").

146. *See id.* (emphasis added).

147. *See* Green v. T.A. Shoemaker & Co., 111 Md. 69, 78, 73 A. 688, 691 (1909) (requiring that the emotional distress be directly related to the defendant's tortious conduct).

148. *See Benyon*, 351 Md. at 507, 718 A.2d at 1184 (stating that "[t]he fact that the fright or mental anguish in this case preceded the crash that resulted in the decedent's fatal bodily injury does not affect causation").

149. *See id.* ("The wrongful conduct need only proximately cause the emotional distress or mental anguish, independent of the physical injuries; the mental disturbance need not result from physical injury.").

is problematic. In *Benyon,* the jury inferred that the decedent had suffered pre-impact fright from evidence that his van veered to the right and created seventy-one and one-half feet of skid marks before impact.[150] In affirming the jury's inference based upon this evidence, the majority deviated from the principle that compensatory damages "must be proved with reasonable certainty."[151]

Only two of the cases cited by the Court of Appeals as allowing recovery for pre-impact fright suffered during a time frame of just a few moments did so without the aid of direct testimony of the decedent's realization of her impending doom.[152] These cases, therefore, leave great doubt as to whether the decedent, in fact, suffered emotional distress before the fatal impact.

While some courts use circumstantial evidence surrounding the decedent's demise to infer pre-impact fright, they usually do so only when the circumstantial evidence is substantiated by the testimony of passengers in the same vehicle or, in some cases, substantiated by the testimony from witnesses able to observe the decedent.[153] The circumstantial evidence in *Benyon,* however, is primarily based upon evidence of seventy-one and one-half feet of skid marks and that the

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150. *Id.* at 465, 508-09, 718 A.2d at 1163, 1185.

151. *See* Asibem Assocs., Ltd. v. Rill, 264 Md. 272, 276, 286 A.2d 160, 162 (1972) (requiring reasonable certainty in determining property values for compensation in contract action); *see also* Maicobo Inv. Corp. v. Von Der Heide, 243 F. Supp. 885, 893 (D. Md. 1965) (observing that "Maryland recognizes the general principle that damages must be reasonably certain and may not be based on speculation or conjecture").

152. *See* Fogarty v. Campbell 66 Exp. Inc., 640 F. Supp. 953, 955 (D. Kan. 1986) (decedent died instantaneously in an automobile accident); Monk v. Dial, 441 S.E. 857, 859 (Ga. Ct. App. 1994) (affirming reasonableness of the jury's inference based on evidence that decedent's vehicle engaged in an evasive maneuver shortly before the collision). In his dissent, Judge Wilner noted that neither of these cases were decided by a state supreme court. *See Benyon,* 351 Md. at 510, 718 A.2d at 1186 (Wilner, J., dissenting).

153. *See* Snyder v. Whittaker Corp., 839 F.2d 1085, 1092-93 (5th Cir. 1988) (using eyewitness testimony that the decedent sailor clung to the hull of a capsized boat for over an hour to infer that the decedent had realized peril and had suffered mental anguish as a result); Solomon v. Warren, 540 F.2d 777, 792-93 (5th Cir. 1976) (using the final radio transmission from the pilot indicating the pilot's intent to "ditch" the airplane at sea to infer the decedents' realization of impending doom and suffering of mental anguish); Chapple v. Ganger, 851 F. Supp. 1481, 1487 (E.D. Wash. 1994) (affirming the trial court's award of compensatory damages for the decedent's pre-impact fright in a car accident where there was "no evidence [that the decedent] had sufficient time to physically react with the vehicle," based on testimony that the decedent's son, a passenger in the car accident, screamed out while in the hospital and not fully cognizant, "Watch out, Mom! Watch out, Mom!"); Thomas v. State Farm Ins. Co., 499 So. 2d 562, 567 (La. Ct. App. 1986) (using passenger testimony that decedent gasped and grabbed the passenger's arm before the fatal impact to support recovery for pre-impact fright); Green v. Hale, 590 S.W.2d 231, 238-39 (Tex. Civ. App. 1979) (using testimony from passengers as to the decedent's body position and his attempt to hold on to the truck's tailgate to prevent himself from falling to support award of damages).

decedent engaged in a slightly evasive maneuver, all of which took about two seconds.[154]

The weight of the evidence in *Benyon* is easily distinguishable from that found in the other cases allowing recovery for the decedent's fright that occurred and lasted for no more than two-and-a-half seconds prior to impact. In three of these cases, *Chapple v. Ganger*, *Green v. Hale*, and *Thomas v. State Farm Insurance Co.*, the circumstantial evidence that the decedent suffered pre-impact fright included testimony from co-passengers located extremely close to the decedent before impact.[155] Most notably, in *Thomas v. State Farm Insurance Co.*, the decedent's estate's claim for pre-impact fright was supported by testimony from the decedent's son, the car's driver, of the decedent's recognition and reaction to the impending danger.[156] Similarly, in *Green v. Hale*, the jury based its inference that the decedent recognized the peril and as result suffered mental anguish based on testimony from passengers located in the same compartment from which the decedent slipped.[157] The proximity of the witnesses enabled them to observe the decedent's body position and attempt to grasp the tailgate to prevent from falling beneath the bed of the truck prior to the impact.[158]

Owing to the fact that the decedent in *Benyon* was the sole occupant of his car, the jury did not hear testimony from co-passengers as to the decedent's reaction to the peril or resultant mental state. Instead, the jury inferred his mental state based on seventy-one and-a-half feet of skid marks and the van's slight swerve to the right.[159] The lack of definitive circumstantial evidence upon which to base a reasonably certain inference leaves the decedent's mental state open to speculative conclusions, and therefore, incapable of objective determination.[160] The decedent possessed only a couple of seconds

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154. *See Benyon*, 351 Md. at 511, 718 A.2d at 1186 (Wilner, J., dissenting) (stating that the decedent's car skidded for "one-and-a-half to two-and-a-half seconds").

155. *See supra* note 153 (discussing evidence in these and other cases).

156. *See Thomas*, 499 So. 2d at 567. The son testified that "[the decedent] looked up and saw the car coming, and she reached over and grabbed my arm, and she gasped, which is a frequent thing that she did when she got frightened." *Id.*

157. *See Hale*, 590 S.W.2d at 238 (regarding testimony from four passengers in the vehicle that the decedent grasped onto tailgate in an attempt to arrest his fall under the truck prior to fatal impact).

158. *See id.*

159. *See Benyon*, 351 Md. at 508-09, 718 A.2d at 1185 (Wilner, J., dissenting) (noting that the jury inferred that the decedent suffered pre-impact fright from "nothing more than seventy-one-and-a-half feet of skid marks").

160. *See id.* at 511, 718 A.2d at 1186 (characterizing the inference, absent evidence beyond skid marks, that the decedent was "consumed with conscious fright" as "rank speculation").

to process thoughts to react and to avoid the collision.[161] Given this short time frame, it is also reasonable to suggest that the decedent did not have enough time to process fearful thoughts and form the resultant anguish. Moreover, his attempt to brake and swerve could have been *purely* instinctive reactions without an emotional component.[162] Also, assuming the decedent did realize the impending impact, it is also possible that he thoroughly concentrated on avoiding the collision thereby suppressing any emotional feeling.[163] Given the various possibilities supported by the circumstantial evidence surrounding the fatal impact in *Benyon*, the Court of Appeals should have affirmed the Court of Special Appeals's vacation of the award of compensatory damages for the decedent's pre-impact fright.

5. Conclusion.—The court's decision in *Benyon v. Montgomery Cablevision, Ltd.*, recognizes pre-impact fright as a legally compensable element of damages in survival actions. This recognition is a logical outgrowth and preserves the policy goals of the "physical injury" rule cases represented by *Green v. T.A. Shoemaker & Co.*, and its progeny by protecting against feigned claims. The court's holding, however, is tainted by its affirmation of this particular damages award calculated by the jury's inferential decision making. The court's affirmation represents a troubling deviation from the principle that compensatory damages must be proven with reasonable certainty and may not be based on speculation or conjecture.

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161. *See id.*

162. *See id.* (arguing that there is a strong possibility that the decedent instinctively made an evasive maneuver and was not contemplating imminent death).

163. *See id.* at 512, 718 A.2d at 1187 (discussing the possibility that the decedent had "marshal[ed] his . . . whole being in a supreme effort to control the event . . . [rather than] consciously pondering the effects of an impending death").

B. An Overextension of Foreseeability Resulting in a Decision of Economic Necessity

In *Coates v. Southern Maryland Electric Cooperative, Inc.*,[1] the Court of Appeals considered whether a utility company had a duty, when placing utility poles, to anticipate and to guard against injuries to passengers in a vehicle that deviated from the roadway.[2] The passengers suffered serious injuries when their car left the road under extraneous circumstances and crashed into a utility pole that was located three feet, three inches from a curve in the roadway.[3] The court ruled that the utility company could not be held liable.[4] In doing so, the court determined that, while the risk of a deviation at a particular place in the road may be foreseeable, the circumstances of this particular accident did not create a foreseeable duty to guard against the accident as it occurred.[5] The court reasoned that the utility had no duty to anticipate that a vehicle traveling in a posted thirty-five-mile-per-hour zone would lose control, spin across the oncoming lane, and strike a pole that was at least fourteen feet from the edge of the lane in which it had been traveling.[6] The court, however, overextended the foreseeability inquiry associated with the determination of a legal duty. The court's decision would have been strengthened had it fully considered economic policy factors and placed more weight on them. Because it is not legal practice to make determinations solely based upon policy considerations, the court could have reached its policy motivated decision by considering the other elements of a negligence cause of action. While the court chose to rule solely based on the duty element, it would have created a stronger decision had it considered breach of duty and proximate cause as well.

1. The Case.—On August 19, 1991, George Thompson was driving his employer's Ford pick-up truck north on Olivers Shop Road in Bryantown, Maryland.[7] Thompson, Mary Ann Coates, and her pregnant, teenage daughter, Lavita Coates, were returning home from a

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1. 354 Md. 499, 731 A.2d 931 (1999).

2. *Id.* at 526, 731 A.2d at 945.

3. *See* Brief for Appellant at 3, Coates v. Southern Md. Elec. Coop., Inc., 354 Md. 499, 731 A.2d 931 (1999) (No. 100).

4. *Coates*, 354 Md. at 525-26, 731 A.2d at 945.

5. *Id.* at 524-26, 731 A.2d at 944-45.

6. *Id.* at 526, 731 A.2d at 945.

7. Brief for Appellant at 3, *Coates* (No. 100). Olivers Shop Road, a rural county highway, is described as "hilly and twisty," with one lane in each direction. *See Coates*, 354 Md. at 504, 731 A.2d at 933. The road has a posted speed limit of 35 miles per hour. *See id.*

party at a friend's house.[8] It was a rainy night, and the road was wet.[9] Thompson testified that the rear tires on the truck he was driving were "kind of bald," and the back of the truck slid "a little bit" when he applied the brakes.[10] After successfully traversing a number of turns, Thompson claims to have slowed to "between 25 and 30 miles per hour" to negotiate a left hand turn.[11] Thompson claims that "[w]hen he hit a 'dip' in the road, the truck began to slide, eventually spinning out of control" in a counter-clockwise direction.[12] The truck spun across both the center line and the southbound lane of Olivers Shop Road, completely leaving the road and eventually colliding with a utility pole located three feet, three inches off the southbound lane.[13] The impact of the pole against the passenger side door caused Mary Ann Coates to sustain serious injuries, of which she later died.[14] The pole also directly struck Lavita Coates, causing her permanent physical and mental damage and the loss of her unborn child.[15]

The pole had been installed by Southern Maryland Electric Cooperative, Inc. (SMECO) in 1954 with the permission of the county.[16] The utility was "to construct electric lines along, upon, or above the streets and roads in Charles County provided that 'the same shall not be so constructed as to incommode the public use of the said' streets and roads."[17] The original pole was made of wood.[18] After being damaged in a previous automobile accident, however, the pole was repaired and reinforced by cutting the pole at ground level, removing the stump, replacing the stump with a concrete stub, inserting a metal sleeve, and then resetting the pole in the metal sleeve.[19] SMECO did not give any consideration to moving the pole from its original location.[20]

Subsequent to the accident, Irene Coates brought suit in the Circuit Court for Prince George's County, individually as mother of the deceased Mary Ann Coates and on behalf of her minor granddaugh-

8. *See* Brief for Appellant at 3, *Coates* (No. 100).
9. *See Coates*, 354 Md. at 504, 731 A.2d at 933.
10. *Id.* (internal quotation marks omitted).
11. *Id.* (internal quotation marks omitted).
12. *Id.*
13. *See* Brief for Appellant at 4, *Coates* (No. 100).
14. *See id.*
15. *See id.*
16. *See Coates*, 354 Md. at 505, 731 A.2d at 933.
17. *Id.* at 505, 731 A.2d at 933-34.
18. *See id.*, 731 A.2d at 934.
19. *See id.*
20. *See id.* at 505-06, 731 A.2d at 934.

ters, Lavita Coates and her unborn child.[21] The suit implicated George Thompson for negligently driving the car[22] and SMECO for negligent placement of the utility pole.[23] With regards to her summary judgment motion against SMECO, Coates produced deposition testimony from two experts supporting her claim that SMECO was negligent in erecting the pole at its current location and in leaving the reinforced pole at the same spot.[24] Dr. Paul Wright, a retired engineering professor, expressed the opinion that the pole was "too close to the road" and stated that it was "accepted orthodoxy" among highway engineering designers that placement of poles "that close to the road especially in the vicinity of curves" was "not a very smart thing to do."[25] He did not, however, have a "magic number" as to how far away the pole should have been placed.[26] Dr. Wright also made it clear that his opinions did not speak to what was customary in the electric utility practice, but only to accepted engineering practices as to whether the road itself was safe.[27]

Coates's second expert, John St. Clair, acknowledged that utilities had no formal policies relating to pole placement, but explained that the informal policy was to keep them off the shoulders.[28] He also stated that when poles are replaced after an accident they are usually put back in the same place.[29] He further expressed particular concern about concrete-reinforced poles, explaining that there is an increased likelihood of damage to vehicles and physical injury to passengers if such poles are struck.[30] St. Clair noted that the best and safest place for a pole on a road with a left curve is on the inside of that curve, as the pole in this case was situated.[31]

The circuit court entered summary judgment for SMECO, finding that the utility owed no duty to the plaintiff.[32] The court ex-

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21. *See* Brief for Appellant at 4, *Coates* (No. 100).

22. *See Coates*, 354 Md. at 503 n.1, 731 A.2d at 933 n.1. The court granted Coates's partial motion for summary judgment as to Thompson's liability even though the issue of damages had not been resolved. *Id.* at 504, 721 A.2d at 933. The court determined that, as a matter of law, Thompson was negligent in his driving of the automobile and that his negligence was the proximate cause of the accident. *Id.*

23. *See id.* at 503, 731 A.2d at 933.

24. *See id.* at 506, 731 A.2d at 934.

25. *Id.* (internal quotation marks omitted).

26. *Id.* (internal quotation marks omitted).

27. *See id.* at 507, 731 A.2d at 935.

28. *See id.* According to testimony, St. Clair has worked for four utility companies. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

plained that the duty of care owed by the utility when placing its poles was not to interfere with the "proper use and reasonable use of the highway by vehicles," and that this duty did not extend to situations in which the driver of the vehicle was negligent.[33] The court concluded that it would be an impossible burden for a utility to anticipate and to prepare for incidents arising from a driver's unreasonable and negligent conduct.[34] Accepting appellate jurisdiction prior to argument before the Court of Special Appeals, the Court of Appeals of Maryland granted review to determine whether SMECO owed a duty to anticipate and to guard against vehicle deviations from the road when constructing utility poles.[35]

2. *Legal Background.*—To state a cause of action in negligence, a plaintiff must prove the following elements: (1) that the defendant was under a duty to protect the plaintiff from injury; (2) that the defendant breached that duty; (3) that the plaintiff suffered actual injury or loss; and (4) that the loss or injury proximately resulted from the defendant's breach of the duty.[36] The plaintiff must establish the existence of all four elements to be awarded monetary compensation.[37]

At the time of *Coates*, the issue of whether a utility company owed a duty of reasonable care in its placement of utility poles to people injured in collisions with utility poles was not a new concern. As far back as 1913, in the case of *Earp v. Phelps*,[38] Maryland courts have addressed the issue of whether a utility company owes a duty of due care to avoid placing its poles at locations that unreasonably endanger those traveling on the roads. In *Earp*, the plaintiff passenger was seated on the lazy board of a horse drawn wagon.[39] The lazy board was located off of the rear, left wheel "and when drawn out to its full length" it "extend[ed] about two and a half feet beyond the hub."[40] The road on which the wagon was traveling was about 22-1/2 feet wide.[41] This distance was the measure between a telegraph pole on one side of the road and a locust tree on the other.[42] The road super-

33. *Id.* (internal quotation marks omitted).
34. *Id.* at 507-08, 731 A.2d at 935.
35. *Id.* at 503, 731 A.2d at 933.
36. *See* Rosenblatt v. Exxon Co., U.S.A., 335 Md. 58, 76, 642 A.2d 180, 188 (1994); *See also* WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 30, at 143 (4th ed. 1971).
37. *See* W. PAGE KEETON, HANDBOOK ON THE LAW OF TORTS § 30, at 143 (4th ed. 1971).
38. 120 Md. 282, 87 A. 806 (1913).
39. *Id.* at 286, 87 A. at 807.
40. *Id.* A lazy board acts as a seat for the person who applies the brakes. *See id.*
41. *See id.*, 87 A. at 807.
42. *See id.*, 87 A. at 807-08.

visor testified that the road surface was worked and graded as wide as possible, that the plow of the road machine sometimes ran against the pole in the course of its work, and that people often drove "right up to the pole."[43] As the wagon moved through this part of the road, the lazy board struck the pole and the plaintiff's leg was crushed.[44]

In deciding whether the telephone company owed a duty to the plaintiff, the court relied on Article 23, section 359 of the 1912 Maryland Annotated Code that provided that utility poles "shall not be so constructed as to incommode injuriously the public use of" the roads.[45] This provision was interpreted as prohibiting the placement of poles "so near the beaten track as to endanger the safety of the travellers."[46] In upholding a verdict for the plaintiff, the Court of Appeals found that the road condition and the surrounding facts did not make "the danger of collision with the pole too remote and improbable to be reasonably anticipated by those who are responsible for its location."[47]

Next, the *Earp* court considered whether the plaintiff should be barred from recovery because he failed to show conclusively that both he and the driver of the wagon were free of negligence.[48] The court found that the evidence set forth at trial did not conclusively establish contributory negligence on the part of the plaintiff.[49] While the court agreed that contributory negligence may bar recovery in a negligence action, it concluded that such questions are left "for the jury to determine from all the circumstances of the particular case."[50] It also noted that such decisions should not be disturbed by the appellate courts unless the act was so "distinct, prominent, and decisive" that ordinary minds could not differ in declaring it to be negligent.[51] Further, the court determined the question of the driver's negligence to be inconsequential because the driver was not considered to be the

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43. *Id.*, 87 A. at 808 (internal quotation marks omitted).

44. *See id.* at 286-87, 87 A. at 808.

45. *See id.* at 287 (internal quotation marks omitted) (quoting MD. ANN. CODE art. 23, § 359 (1912)). This statutory duty is now codified in MD. ANN. CODE art. 23, § 318 (1998).

46. *Id.*

47. *Id.* at 288-89, 87 A. at 809.

48. *Id.* at 289-90, 87 A. at 809.

49. *Id.* at 290, 87 A. at 809 ("[W]e are not willing to decide that [plaintiff's] conduct . . . was so distinctly and decisively negligent to prevent his recovery.").

50. *Id.* (internal quotation marks omitted) (quoting Roth v. Highways Comm'n, 115 Md. 469, 479, 80 A. 1031, 1035 (1911)). The court recognized that the question of contributory negligence had been duly submitted to the jury and negatively decided during the trial. *See id.*

51. *Id.* (internal quotation marks omitted) (quoting *Roth*, 115 Md. at 479, 80 A. at 1035).

agent or servant of the plaintiff.[52] Thus, the court found that the passenger "was not bound by the driver's negligence even if it had been established by the testimony."[53]

Thirty years later, in *Parsons v. Chesapeake & Potomac Telephone Co.*,[54] the Court of Appeals of Maryland was faced with another case involving allegation of liability due to the negligent placement of a utility pole. In *Parsons*, the plaintiff was operating an automobile which unexplainedly deviated from the traveled portion of a state highway and immediately encountered an overgrown ditch.[55] The abrupt side of the ditch "forcibly guided [the] automobile" into the defendant's pole.[56] Both the plaintiff and his passenger filed suit.[57]

While *Earp* recognized a duty not to incommode injuriously the public use of roads,[58] the *Parsons* court found that the ditch constituted the intervening, superseding cause of the plaintiffs' injuries.[59] The court explained that because the ditch had "forcibly guided said automobile into said pole," it would have made no difference whether the utility had placed the pole further away from the roadside.[60] The court reasoned that where the negligence of the defendant was not the sole cause of the injury complained of, "without the intervention of any independent factor[s]," a plaintiff's claim is unactionable.[61] Thus, the utility company could not be held liable.

A few years later, in *East Coast Freight Lines v. Consolidated Gas Co.*,[62] the Court of Appeals revisited the question of a utility's duty. In this case, a tractor trailer was driving late at night on an unlit road that became divided in the middle by a six-foot grass plot.[63] Under contract with the City of Baltimore, the defendant gas and electric company had constructed a line of electric light poles in the grass plot, and both maintained and supplied the poles with electric current.[64]

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52. *Id.* at 293, 87 A. at 810.

53. *Id.*

54. 181 Md. 502, 30 A.2d 788 (1943).

55. *Id.* at 504-05, 30 A.2d 789.

56. *Id.* at 504, 30 A.2d at 789 (internal quotation marks omitted).

57. *See id.* at 503, 30 A.2d at 789.

58. *See supra* notes 45-46 and accompanying text (discussing the *Earp* court's recognition of such a duty).

59. *Parsons*, 181 Md. at 505, 30 A.2d at 790.

60. *Id.* (internal quotation marks omitted).

61. *Id.* (internal quotation marks omitted) (quoting Holler v. Lowery, 175 Md. 149, 161, 200 A. 353, 358 (1938)). This finding is based on a failure to establish proximate cause, one of the four elements required in a negligence claim. *See supra* notes 43-44 and accompanying text (setting forth the elements of a negligence claim).

62. 187 Md. 385, 50 A.2d 246 (1946).

63. *See id.* at 388, 50 A.2d at 247-48.

64. *Id.* at 391-92, 50 A.2d at 249.

The light on the pole nearest the beginning of the grass plot was not lit on the night in question.[65] Unable to see the division, the tractor drove into the curbing around the plot, struck the pole, spun over the west-bound lane, and crashed into a tractor traveling in the opposite direction.[66]

There was evidence that the pole had been struck a number of times before and had been repaired by the electric company after each incident.[67] The plaintiff alleged that the pole was a dangerous nuisance and that the utility was negligent in continuing to repair and replace it.[68] The court, following *Earp*, stated that "[a]n electric light pole is not a nuisance by itself, although it may become one by reason of its location."[69] The court explained that a utility may be liable if the pole is located improperly—in such a way as to endanger traffic.[70] Nevertheless, the court denied any liability on the part of the utility, finding that "where competent municipal or public authority has fixed the location of obstructions, such obstructions are not of themselves nuisances and the contractor who places them in the designated position is not responsible."[71]

Following this rule, in *East Coast Lines v. Mayor of Baltimore*,[72] the Court of Appeals determined that Baltimore City could be held liable for the injuries to the same plaintiff.[73] In an extended complaint, the plaintiff attacked the municipal authority that had ordered the construction of the poles, claiming the city was negligent in its creation of a dangerous obstruction and its failure to post adequate warnings of this danger.[74] The court concluded that the city "was under a legal duty to anticipate the occurrence of such weather conditions as existed at the time of the accident" and therefore should have "placed

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65. *See id.* at 388, 50 A.2d at 248.

66. *See id.* at 388-89, 50 A.2d at 248.

67. *See id.* at 392, 50 A.2d at 249.

68. *See id.* at 393, 50 A.2d at 250.

69. *Id.* at 397-98, 50 A.2d at 252.

70. *Id.* at 398, 50 A.2d at 252.

71. *Id.*; *see also* Green v. Mayor of Baltimore, 181 Md. 372, 30 A.2d 261 (1943). *Green* involved an accident where an automobile collided with a pylon in the middle of the street that was erected by a railway company under the city's direction to create a "safety zone." *Id.* at 376, 30 A.2d at 262. The court explained:

> [The pylons] are obstructions in the streets, intentionally erected by the city . . . but their purpose is to promote, not hinder, the public safety. If we were to yield to the plaintiff's contention it would be to declare these safety zones, protected by pylons to be nuisances per se, but we are unwilling to do this.

Id.

72. 190 Md. 256, 58 A.2d 290 (1948).

73. *Id.* at 279, 58 A.2d at 301.

74. *See id.* at 270, 58 A.2d at 297.

such warning devices, which under storm conditions, would have permitted a traveler approaching the grass plot to have discovered its location in time to avoid colliding with it."[75]

Sixteen years later, in 1964, the *Restatement (Second) of Torts* was published. Section 368 is entitled, "Conditions Dangerous to Travelers on Adjacent Highway[s]."[76] This section states that a landowner is subject to liability for injury caused by conditions on his property when the persons injured by such condition are traveling on the highway or reasonably deviate from it.[77] To clarify the position of this rule, comments were published for guidance purposes. Comment h states that "the essential question is whether [the pole] is so placed that travelers may be expected to come in contact with it in the course of a deviation reasonably to be anticipated in the ordinary course of travel."[78] Comment e states that "[t]he public right to use the highway carries with it the right to protection by reasonable care against harm suffered in the course of deviations which may be regarded as the normal incidents of travel."[79] Finally, comment i states that "[t]he possessor's obligation is only one of reasonable care in the light of the risk; and he is not liable . . . where he has taken all reasonable precautions."[80] While this is the most current version of the *Restatement*, and, as such, holds weight, many feel it is lacking in clarity and revision is needed in light of modern changes to tort law.[81]

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75. *Id.* at 279, 58 A.2d at 301. This holding was strengthened by the fact that the lamp post was painted green, and situated in a green grass plot surrounded by a curb that could not be seen given its color and its surroundings. *See id.* at 278, 58 A.2d at 300-01. These conditions were found by the court to constitute a threat to the safety of the traveling public. *Id.* at 278-79, 58 A.2d at 301.

76. RESTATEMENT (SECOND) OF TORTS § 368 (1964).

77. The *Restatement* provides:

> A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who (a) are traveling on the highway, or (b) *foreseeably* deviate from it in the ordinary course of travel.

Id.

78. *Id.* § 368 cmt. h.

79. *Id.* § 368 cmt. e.

80. *Id.* § 368 cmt. i.

81. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 3, at 17 (5th ed. 1984); *see also* Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of Consensus on the Expansion of the Analysis of Duty and the New Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1513-15 (1997).

3. The Court's Reasoning.—In *Coates v. Southern Maryland Electric Cooperative, Inc.*, the Court of Appeals held that SMECO had no duty, in installing utility poles, to anticipate and to guard against the plaintiff's deviation from the traveled portion of the road.[82] Judge Wilner, writing for the majority, began his analysis by considering the current state of Maryland law with regard to a negligence cause of action.[83] Judge Wilner noted that, to bring a negligence cause of action, the plaintiff must first show that the defendant was under a duty to protect the plaintiff from injury, and that, in determining the existence of duty, the court has applied a "foreseeability of harm" test.[84] The court noted that this test was based on the "recognition that duty must be limited to avoid liability for unreasonably remote consequences."[85] Judge Wilner also noted that an assignment of duty requires a relationship between the parties, even though this need not be a direct relationship when the action in question creates a risk of personal injury.[86]

The majority recognized that, ultimately, a determination of duty assignment is made by weighing various policy considerations and reaching a conclusion that the plaintiff's protection necessitates a higher standard of conduct upon the defendant.[87] While the majority refused to provide a set formula for making this determination, it looked to a number of factors including "convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, . . . the moral blame attached to the wrongdoer,"[88] and "the extent of the burden to the defendant . . . [,] consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved."[89]

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82. *Coates*, 354 Md. at 526, 731 A.2d at 945.

83. *Id.* at 509-14, 731 A.2d at 936-39.

84. *Id.* (internal quotation marks omitted) (quoting Rosenblatt v. Exxon Co., U.S.A., 335 Md. 58, 77, 642 A.2d 180, 189 (1994)). This test assigns duty when the action in question taken together with outside circumstances carries a recognizable probability of harm. *See id.* (citing Valentine v. On Target, Inc., 353 Md. 544, 551, 727 A.2d 947, 950 (1999)).

85. *See id.* (internal quotation marks omitted) (quoting *Rosenblatt*, 335 Md. at 77, 642 A.2d at 189).

86. *Id.* (citing Jacques v. First Nat'l Bank of Md., 307 Md. 527, 535, 515 A.2d 756, 760 (1986)).

87. *Id.* (citing *Rosenblatt*, 335 Md. at 77, 642 A.2d at 189).

88. *Id.* (internal quotation marks omitted) (quoting KEETON ET AL., *supra* note 81, § 53).

89. *Id.* (internal quotation marks omitted) (quoting Tarasoff v. Regents of the Univ. of Calif., 551 P.2d 334, 342 (1976)).

Keeping these factors in mind, the majority looked to the *Restatement (Second) of Torts* section 368.[90] The majority focused on clause (b) and recognized the language's possibility for expanding liability beyond its practical interpretation.[91] Judge Wilner affirmed the assignment of duty as a question of foreseeability. He looked to comment h of section 368 for further clarification. The majority noted that while comment h recognizes the obvious relevance of the distance between the condition and the roadway, that distance is important "only as it affects the recognizable risk."[92] The court further recognized comment h and its implication that other factors, "such as the nature of the condition itself, its accessibility, and the extent and character of the use of the highway, must be taken into account."[93] The court also looked to comment e for guidance.[94] The majority recognized comment e as an indication of the policy intent to make foreseeability the cornerstone in the assignment of duty.[95]

After an extensive discussion of the law in Maryland and other jurisdictions with respect to the liability of utility companies arising from the placement of utility poles,[96] the court turned its attention to the case at hand.[97] The court began this discussion by admitting that the documented number of collisions between automobiles and roadside poles made it impossible to claim that off-road collisions are not generally foreseeable.[98] The majority recognized numerous reasons why a vehicle might leave a road under "normal incidents of travel," even when some of those reasons would not constitute proper use of the highway or traveling "with reasonable care."[99]

Nevertheless, the majority found that, in determining liability, the decisive consideration was not whether it was foreseeable that *some* pole would be struck, but whether it was foreseeable that a *particular* pole would be struck.[100] Because "most poles . . . [probably] exist for years . . . without incident," and "most people are able to navigate . . . without running into a pole," the court concluded that although deviations occur with some frequency and are therefore to be generally

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90. *Id.* at 517, 731 A.2d at 940 (citing RESTATEMENT (SECOND) OF TORTS § 368); *see supra* note 77 and accompanying text.

91. *Coates*, 354 Md. at 517, 731 A.2d at 940.

92. *Id.*

93. *Id.*

94. *Id*; *see supra* note 79 and accompanying text.

95. *Coates*, 354 Md. at 517, 731 A.2d at 940.

96. *See id.* at 510-22, 732 A.2d at 936-43.

97. *Id.* at 522, 732 A.2d at 943.

98. *Id.*

99. *Id.* at 523, 731 A.2d at 943 (internal quotation marks omitted).

100. *Id.*, 731 A.2d at 943-44.

anticipated, a collision with a *particular pole* is not per se foreseeable "merely by virtue of its proximity to the traveled portion of a road."[101] Instead, the court asserted that the foreseeability of collision with a particular pole would be "based on the condition and topography of the road, the proximity of the pole to the traveled portion of the road, other site conditions, and experience."[102] According to the majority, of these factors, "experience" would usually be the best guide in determining foreseeability.[103] The court noted that experience, absent significant changes to the road or site, could "amalgamate" many of the other relevant factors.[104] Judge Wilner opined that "[i]f a pole has existed at a relatively unchanged site for any significant length of time without serious problem, there may be little reason to anticipate a future collision, for it suggests that motorists are able to navigate that part of the road without incident."[105]

Next, the court briefly addressed a few public policy considerations.[106] The court noted first, that "the same general principle that applies to utility poles" might also apply to other items that are placed along public roadways, including signs, railings, and landscaping left by adjacent property owners.[107] The majority also expressed its intention not to establish a law which would provide absolute immunity for utility owners, negating the incentives for utilities to use due care in their placement of poles.[108] Nevertheless, the majority declined to "create the prospect of a damage award every time someone ran off the road and struck a pole," reasoning that allowing juries to decide liability in these situations would likely result (1) in an increase in cost and decrease in the availability of liability insurance, and (2) would force utilities to move hundreds, if not thousands, of poles at enormous cost and inconvenience.[109]

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101. *Id.*, 731 A.2d at 944.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* Apparently, the majority did not find it "important" that the particular pole at issue in the case had been struck one time about ten years before the accident in question. *Id.* at 526, 731 A.2d at 945 (stating that the record contained no information as to the nature of the previous collision and whether it was "a freakish event not likely to be repeated").

106. *Id.* at 523-24, 731 A.2d at 944 (pointing to such factors as "convenience of administration, the extent of the burden on the utility and its capacity to bear that burden, the benefit or detriment to the community, the desire to prevent future injuries, and any moral blame associated with the placement of the pole").

107. *Id.* at 524, 731 A.2d at 944.

108. *Id.*

109. *Id.*

For these reasons, the majority found SMECO had no duty to anticipate and guard against the type of deviation which occurred in the case before it, i.e., "that a vehicle traveling in a posted 35 mile per hour zone would go so out of control as to spin across the oncoming lane and strike a pole that was at least 14 feet from the edge of the lane in which the vehicle was traveling."[110] The court further explained that the question of Thompson's negligence had no impact on the determination of whether a duty existed; the only consideration was whether SMECO had a duty to anticipate such a deviation as occurred here.[111]

In a concurring opinion, Judge Cathell accused the majority of not going far enough in its limitation of utility liability.[112] He found the majority's "reliance on foreseeability" as too expansive a standard for determining liability, reasoning that such a reliance would open the possibility that owners of property abutting public roads would be held to a "duty to make sure there are no obstacles on the owner's property for the uninvited motorist to strike."[113] Instead, Judge Cathell argued that the better result would be to hold that "there is no duty on the part of a property owner to provide a safe place on his or her property for motorists, and their passengers, to have accidents."[114] According to Cathell, to find otherwise would create an unacceptable burden upon landowners to remove potentially dangerous obstacles such as trees, ponds, rocks, and even animals.[115] He concluded that so long as the property owner's activities do not encroach upon the traveled portion of the roadway, the court should find no duty for landowners to do anything on their property to lessen the damage to passengers injured by the actions and/or negligence of themselves or others.[116]

4. Analysis.—First and foremost, the result of the *Coates* decision was consistent with the Court of Appeals's past decisions in previous tort actions of this nature.[117] Although the court's holding resulted in

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110. *Id.* at 526, 731 A.2d at 945.

111. *Id.*

112. *Id.* (Cathell, J., concurring). Judge Eldridge joined in the concurrence. *Id.*

113. *Id.* at 527, 731 A.2d at 946.

114. *Id.* at 528, 731 A.2d at 94. Judge Cathell also asserted that "without duty, there is no liability, regardless of whether a result is foreseeable or a party has the power to influence that result." *Id.* at 530, 731 A.2d at 947.

115. *See id.* at 527, 731 A.2d at 946.

116. *Id.* at 530, 731 A.2d at 947.

117. *See* Parsons v. Chesapeake & Potomac Tel. Co. of Baltimore City, 181 Md. 502, 506, 30 A.2d 788, 790 (1943) (denying liability on the grounds that the position of the pole was not the proximate cause of the accident, but that it was the condition of the ditch and road

the appropriate outcome, the court's reasoning was incomplete. In reaching its decision, the court should have considered public policy factors to a greater degree than it did in its denial of SMECO's liability. Moreover, a decision addressing lack of a breach or lack of causation would have been more compelling than the court's determination that SMECO owed no duty because a collision with this particular pole was unforeseeable.

a. The Court's Determination on Duty.—In determining what case law to follow, the *Coates* court had three elements of appellant's negligence claim to review.[118] The *Coates* court chose to focus its reasoning on the question of duty. As discussed above, the court found that SMECO owed no duty and therefore was not liable for the plaintiff's injuries.[119] The court's reasoning, however, is misguided. The majority's discussion of foreseeability relies too heavily on issues of breach and causation in its duty determination. Although this overextension of foreseeability has been replicated in other tort analyses,[120] it is this overextension and the court's decision to ignore relational and public policy issues that weakens the standing of the court's conclusion.

Doctrinally, duty is identified as the first element of a prima facie case of negligence and is distinguished from the second element, breach.[121] The existence of duty is a prerequisite to negligence liability, and is the foremost question to be answered, as a matter of law.[122] The duty question in negligence cases is whether the defendant owed a legally cognizable duty to the plaintiff to use a particular level of care, under a particular set of circumstances, to avoid the injury plain-

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side); Green v. Mayor and City Council, 181 Md. 372, 376, 30 A.2d 261, 262-63 (1943) (denying guest in automobile recovery because the proximate cause of the accident was not the negligence of the defendant but that of another party); Mayor of Cumberland v. Turney, 177 Md. 297, 320, 9 A.2d 561, 571 (1939) (determining that plaintiff's failure to use ordinary care while traversing a road was the proximate cause of the accident); Earp v. Phelps, 120 Md. 282, 287-89, 87 A. 806, 808-09 (1913) (holding owner of telephone pole liable for plaintiff's injuries because the position of the pole was so close to the road that it required a reasonable anticipation of a collision).

118. *Coates*, 354 Md. at 528-29, 731 A.2d at 947-48.

119. *See supra* note 110 and accompanying text.

120. Prosser has pointed out that duty has been frequently dealt with in terms of proximate cause. It has been this treatment which has resulted in confusion over the appropriate duty considerations. *See* KEETON ET AL., *supra* note 81, § 53, at 358.

121. *See* PROSSER, *supra* note 36, § 30, at 143.

122. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. Ct. App. 1928).

tiff suffered.[123] This duty is often described as conducting one's self under the restraints of reasonable (due) care.[124]

The determination of whether a duty is owed by one person to another requires the consideration of three factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the injured party, and (3) public policy concerns.[125] Thus, duty is measured by the scope of the risk that the defendant's conduct foreseeably entails to the injured party.[126]

When making its duty determination, the *Coates* court relied almost exclusively upon the foreseeability prong. In its consideration, the court overexpanded the breadth of the foreseeability inquiry intended for duty determinations. This expansion moved the court's discussion from the duty element to the type of foreseeability relied upon in determining proximate cause.

It is undisputed that a utility company owes the public a duty when choosing where to place its utility poles. This duty requires utilities to construct lines and necessary fixtures that do not "incommode injuriously the public use" of the roads or highways.[127] The court's conclusion that SMECO's pole placement did not "incommode" the public use of the road was logical given the amount of traffic traversing the road without incident.[128]

The plain language of the Maryland statute, however, limits this duty to individuals traveling on the roadway. Because the injury in question occurred off the roadway, the court was forced to consider whether SMECO owed the public a duty to anticipate and to guard against the type of road deviations leading to the injuries here.[129] The court, utilizing the "foreseeability of harm" test, determined that SMECO had no duty to anticipate and guard against the deviation

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123. *See* PROSSER, *supra* note 36, § 30, at 324; *see also* Ashburn v. Anne Arundel County, 306 Md. 617, 626-27, 510 A.2d 1078, 1083 (1986).

124. *See* PROSSER, *supra* note 36, § 32, at 149-51. The theory of negligence presupposes this uniform standard of behavior. This standard of reasonable care holds individuals to act as a reasonable man of ordinary prudence would under the same set of circumstances. *Id.*; *see also* KEETON ET AL., *supra* note 81, § 31, 169 (stating that due care is the almost universally used phrase to describe what is not negligent).

125. *See* Bush v. Northern Indiana Pub. Serv. Co., 685 N.E.2d 174, 179 (Ind. Ct. App. 1997). Relationship and foreseeability are discussed *infra* notes 134-138 and accompanying text.

126. FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 18.2, at 655 (2d ed. 1986).

127. MD. ANN. CODE art. 23, § 318 (1998); *see supra* notes 45-46 and accompanying text.

128. *Coates*, 354 Md. at 524-525, 731 A.2d at 944.

129. *Id.* at 522, 731 A.2d at 943. This anticipation and protection from injuries would require placement of the utility pole in a reasonably safe place.

because a collision with the specific pole involved in the accident was unforeseeable.[130]

The court came to this conclusion despite the fact that it recognized off-road collisions between vehicles and utility poles as "generally foreseeable."[131] This general foreseeability should have been enough to trigger a duty between SMECO and individuals in vehicles deviating from the road.[132]

In the landmark decision *Palsgraf v. Long Island R.R. Co.*,[133] Judge Cardozo established the use of foreseeability when making duty determinations. While reasonable foreseeability figures prominently in *Palsgraf*, it does so only as part of a relational conception of duty.[134]

In actuality, *Palsgraf* dealt with two duty issues. The first was whether the railroad owed a duty of care to its customer, Mrs. Palsgraf. It is obvious that the railroad did, and thus, there was no need for any discussion of reasonable foreseeability on this point. Instead, Judge Cardozo used foreseeability to establish the outer boundary on the level of precaution the railroad was required to provide.[135] Because the harm that Mrs. Palsgraf suffered was unforeseeable to the conductor who pushed the package-carrying passenger, the court was required by law to conclude that the duty owed to Mrs. Palsgraf was not breached.[136] This conclusion led to the question of whether Mrs. Palsgraf should be permitted to borrow the railroad's negligence towards another, because it was already presumed to have breached its duty of reasonable care with respect to the package-carrying passenger.[137] Judge Cardozo denied liability, finding that the duty alleged to have been breached by the defendant must be relational to the plaintiff.[138]

Using the *Palsgraf* reasoning in the present case, it would appear that a duty was owed by SMECO. The possibility of a vehicle deviating

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130. *Id.* at 526, 731 A.2d at 945; *see supra* note 110 and accompanying text.

131. *See supra* notes 94-95 and accompanying text.

132. This duty would have required SMECO to use reasonable care when placing its poles so as to avoid injury to people in vehicles deviating from the road.

133. 248 N.E. 99 (N.Y. Ct. App. 1928).

134. *Id.* at 99-100. Judge Cardozo stated: "The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relative to her it was not negligence at all." *Id.*

135. *Id.* (reasoning that to ask defendants to take measures against unforeseeable harms is to demand of them "extravagant" care, rather than ordinary, reasonable care).

136. The court noted: "If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, al least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to someone else." *Id.* at 99.

137. *Id.* at 100.

138. *Id.* ("What the plaintiff must show is 'a wrong' to herself; i.e., a violation of her own right, and not merely a wrong to some one else . . . .").

from the road and colliding with the utility pole, by the court's own admission, was foreseeable. In contrast to *Palsgraf*, SMECO's placement of a utility pole along a roadway could foreseeably result in injury to those deviating from that roadway. This foreseeability is directly relational to the plaintiff. Therefore, SMECO had a duty to use reasonable care in its placement of the pole so as not to make deviations unreasonably dangerous. Unless the court is willing to make all persons who deviate from the road outside the scope of the pole placement relational duty,[139] foreseeability should have required the court to find a duty owed by the defendant.

The court's discussion, however, went outside of the "duty foreseeability" established in *Palsgraf*. The court reasoned that SMECO could not be held liable because, given the condition and topography of the road, the proximity of the pole to the traveled portion of the road, experience, and other site conditions, the collision with this particular pole was unforeseeable.[140] While all of these factors make the probability of a deviation more or less likely, these considerations are better left to the breach element of negligence analysis.[141] In assigning duty, foreseeability is not to be measured in terms of what is more probable or not, but "includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct."[142] Given the nature of travel today and the number of documented off-road collisions, the

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139. This type of holding would create absolute immunity for utilities in pole placement, unless the pole was situated in a manner making normal road travel impossible. Such a holding appears to be in opposition with sound public policy principals. Limiting duty to individuals who remain on the road would negate all incentives for utility companies to place their poles in reasonably safe places. The court recognized the potential danger of eliminating this duty when it said, "[w]e do not wish, or intend, to establish a law that provides an absolute immunity for utility companies and gives them no incentive to use due care in the placement of their poles." *Coates*, 354 Md. at 524, 731 A.2d at 944. Moreover, there are instances where a driver, using the road in a reasonable manner, consistent with the intended use of the road, may be forced to leave the roadway. If a pole were placed in such a position that it was the proximate cause of injuries to that driver forced to deviate under foreseeable circumstances, it seems unreasonable that compensation should be barred. *See* McMillan v. Michigan State Highway Comm'n, 393 N.W.2d 332, 339-40 (Mich. 1986) (reasoning that pole placement outside the traveled portion of a highway carries an obligation of reasonable conduct for the benefit of vehicles which leave that highway); *see also supra* notes 78, 79, and 122 and accompanying text and *infra* note 147.

140. *Coates*, 354 Md. at 525, 731 A.2d at 944-45.

141. *See infra* discussion part 4.c; *see also* Bush v. Northern Indiana Pub. Serv. Co., 685 N.E.2d 174, 179 (1997) ("When analyzing foreseeability in the context of duty we must focus on the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence.").

142. HARPER ET AL., *supra* note 126, § 18.2, at 658-59 & n.9.

foreseeability of a deviation along a road should be accounted for.[143] Moreover, a duty may be imposed on a defendant even if a victim's own conduct brings him within the range of a danger, so long as that conduct is foreseeable.[144]

b. Public Policy as the Ultimate Consideration.—While the relational and foreseeability prongs of the duty inquiry favor imposition of a duty, the court could have justified its finding of no duty by placing more weight on public policy considerations. The Court of Appeals has often addressed public policy factors when making tort liability decisions.[145] These policy considerations are important and should be weighed when reaching conclusions as to whether the plaintiff's interests are entitled to legal protection against the conduct of the defendant.[146] Because duty is a legal conclusion, the court would have been free to direct attention to the policy issues, in order to determine the extent of the original obligation and its continuance.[147]

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143. The court recognized that there is a level of risk that a vehicle will deviate from the road. *Coates*, 354 Md. at 522, 731 A.2d at 943. Greater road congestion, more prevalent roads, and faster vehicles have all added to increased documentation of collisions between vehicles and roadside poles. Vehicle malfunction, tire blow-outs, brake failure, loss of control, carelessness, drowsiness, or intoxication have become almost commonplace in the course of "normal travel." *Id.* at 522-23, 731 A.2d at 944. As reasonable incidents of normal travel, such deviations appear to fall within the explanations of comments (e) and (h) of the *Restatement*. *See supra* notes 78-79 and accompanying text.

144. HARPER ET AL., *supra* note 126, § 18.2, at 659.

145. *See e.g.*, Ashburn v. Anne Arundel County, 306 Md. 617, 627, 510 A.2d 1078, 1083 (1986); Coates, 354 Md. At 509, 731 A.2d at 936 (*quoting* Rosenblatt v. Exxon Co., U.S.A. 335 Md. 58, 77, 642 A.2d 180, 189 (1993)); *see also* KEETON ET AL., *supra* note 81, § 54, at 359. These factors include, but are not limited to, the foreseeability of harm, the nexus between the defendant's conduct and the injury suffered, the policy of preventing future harm, the capacity of the parties to bear the loss, the moral blame attached to the wrongdoer, the extent of the burden to the defendant, the consequences to the community of imposing a duty with resulting liability, and the cost and prevalence of insurance for the risk involved. *Id.*

146. *See Rosenblatt*, 335 Md. at 77, 642 A.2d at 189. It is important to note that the purpose of tort liability is not to compensate any injured party, returning them back to their original state. It is to compensate an innocent party who should not be expected to bear the burden of a particular injury caused by the negligent action of a separate party. *See generally* PROSSER, *supra* note 36, §§ 1,2, at 1-7.

147. *See* McMillan v. Michigan State Highway Comm'n, 393 N.W.2d 332, 334, 340 (Mich. 1986) (discussing the relationship between duty and proximate cause, and ultimately finding defendant utility owed a duty of reasonable care in positioning and maintaining its utility poles because no policy justification for insulating utilities from liability could be found).

When looking at the policy considerations, it is easy to see why the court wanted to use duty as a limitation on liability.[148] Had the court determined that SMECO had a duty to protect against the accident and, in turn, was liable for the plaintiff's injuries, regardless of the extraordinary factors surrounding the accident, the court would have created a presumption of negligence against utility companies whenever a vehicle crashed into a utility pole. Utility companies would be unable to avoid liability if there was an accident with a pole, regardless of where the pole had been placed.[149]

The foreseeability test was created and utilized because the courts recognized the necessity to limit duty to avoid the imposition of liability for "unreasonably remote consequences."[150] If utilities had a duty of reasonable care in their pole placement and liability was determined on whether or not a crash occurred, there would be no limitation of duty.

It is under this umbrella of absolute duty from which the appellant asked for compensation.[151] Appellant argued that the level of care used in SMECO's pole placement was the only determinant affecting risk.[152] This would mean that victims' actions play no role in the risk analysis because, presumably, the victims could not have done anything to prevent the harm.[153] Appellant asks for compensation de-

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148. The court expressed its reluctance to impose a duty and, thus, make liability in every accident a question for the jury. *Coates*, 354 Md. at 523, 731 A.2d at 944; *see also supra* note 114.

149. This is necessarily true because all accidents today have a degree of foreseeability. If this general foreseeability created a duty to use reasonable care in the placement of utility poles so as to guard against the foreseeable injury associated with off-road deviations, a crash would create a presumption of duty breach. This presumption would not be rebuttable if the extraneous circumstances of the crash were made irrelevant (or ignored during deliberations). Because it would be impossible to erect poles which would be crash friendly, the policy would imply a breach of this duty whenever an accident occurs. The burden to prove causation would lie with the plaintiff in order to complete the negligence claim.

150. *Coates*, 354 Md. at 509, 731 A.2d at 936; *see also Rosenblatt*, 335 Md. at 77, 642 A.2d at 189 (explaining that a defendant causing injury to plaintiff can not be liable under negligence if defendant did not owe a duty to plaintiff to avoid said injury).

151. Essentially, the appellant is arguing that the utility failed to protect against a risk that it was required to anticipate, and therefore it should be held liable. This failure was placement of a utility pole in an unreasonable place. The placement is assumed to be unreasonable because the victims' vehicle collided with the pole.

152. *Coates*, 354 Md. at 508, 731 A.2d at 935; *see also* STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 6-7 (1987) (explaining that in some accidents, only the injurer's behavior affects the risk of said accident. In these cases, the accidents are seen as unilateral, in that the victim's activities play no role in creating the harm, not could they have done much to prevent the harm.).

153. The question as to whether the driver's contributory negligence may be imputed onto the victims was passed on by the court and will therefore be considered a moot topic.

spite the fact that this was an unusual accident caused by reckless driving and not by the placement of the utility pole.[154] To affirm this request would create a ruling akin to strict liability.[155]

Finding liability for utility companies in spite of an accident's surrounding circumstances would negate all incentive for utility companies to plan and place poles in the safest location possible.[156] Economic interests would lead utilities to place poles in whatever locations offered cheapest installment, easiest access, and greatest serviceability. These locations might sometimes be safe or at substantial distance from roads, but such occurrences would be purely coincidental. This result can not be reconciled with the court's policy of preventing future harm.[157]

Moreover, creation of utility liability for all vehicle/pole collisions would drive the cost of utilities' liability insurance up astronomically.[158] This cost, in turn, would be passed along to everyday consumers who would face exponential price increases.[159] This is a relatively frightening thought considering society's dependence upon the mass

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154. *See infra* discussion part 4.d.

155. An affirmation of liability would hold the utility liable for all injuries caused in the crash regardless of the degree of care exercised in the placement of the pole. *See supra* notes 148-149 and accompanying text.

156. *See* MARK C. RAHDERT, COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM 39 (1995) (discussing how strict liability fails to take cost-benefit determinations into account and therefore results in suboptimal allocation of resources with respect to safety issues). This is especially true if any defense based on the victim's negligence is eliminated, because, under such a regime, any incentive for the consumer of a product or service to engage in safe conduct is virtually eliminated. The producer of that product or service would bear the cost of accidents under all circumstances. *Id.*

157. *See generally* PROSSER, *supra* note 36, § 1, at 1-6.

158. *See* LIABILITY: PERSPECTIVES AND POLICY 5 (Robert E. Litan & Clifford Crawfford eds., 1988) (discussing the unprecedented growth of personal injury lawsuits and this trend's detrimental effect on the stability of liability insurance premiums and availability in general). Insurers must forecast future losses when setting premiums. *Id.* Over-insurance for high-risk candidates will make product prices too high. *Id.* The majority briefly recognized this point, stating that allowing juries to decide liability would likely "remove availability of affordable liability insurance for utilities . . . ." *Coates*, 354 Md. at 524, 731 A.2d at 944.

159. *See* LIABILITY: PERSPECTIVES AND POLICY, *supra* note 158, at 5. Product price has three components: cost of production (including cost of prevention), a premium for desired insurance, and a premium for undesired insurance payout. Faced with paying out this extra insurance, producers increase their prices beyond their efficient level to compensate for the increase in operating costs. This sets the stage for a natural dichotomy of interests. *Id.*; *see* TORT LAW AND THE PUBLIC INTEREST 17 (Peter H. Schuck ed., 1991). Consumer interest that products and services be safe, and an interest that they be cheap seem to co-exist in constant tension. For the safer the product, the more the production cost, and the more the production cost, the greater the sale price. *Id.*

availability of utility services.[160] Many areas are provided with gas and electric by only one company.[161] The average consumer would be faced with either paying the price increase of these virtual monopolies or foregoing the benefits of modern technology.

Some might argue that a possible solution to this absolute liability regime would be to carve out a liability exception for utility companies who place their poles at a minimum safe distance from any given roadway. The logic behind this argument is that after a certain distance, the likelihood of a vehicle deviating so far off the road as to create the possibility of a vehicle/pole collision is so remote that it would be deemed unforeseeable.

Unfortunately, this argument is fundamentally flawed. First, there is no "magic number" at which the possibility of a collision becomes unreasonably remote. Appellant's witness, Dr. Wright, was unable to give such a number, despite his expert status and years of experience, with regards to the limited situation in *Coates*.[162]

Second, the designation of minimum safe distances is impracticable given the varying terrain of the country. Certain roads run through areas with limited space available for pole construction. For example, rural, mountainous roads often have steep grades and are narrow and windy. It would be both overly expensive and burdensome to expect a utility to grade a roadside, clear a shoulder, construct on a mountain slope, or make other improvements just to situate a utility pole at a certain distance.

Third, mandating "minimum safe distance" could lead to the unnecessary extension of liability to private property owners. The rational behind the "magic number" theory is to create an open area for vehicles to safely stop if they deviate from the road. This concept raises implications as to other natural obstructions occurring in close proximity to traveled portions of the highway. If utility companies were required to construct utility poles at a certain distance from a roadway so as to avoid liability for accidents occurring therewith, a similar rule might be extended to owners of private property abutting

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160. Because society today is so dependant upon municipal services, the court should consider the necessity to have readily available gas, electric, water, etc. services for the population. This includes availability to rural and more isolated locations. *See* Pennsylvania Water & Power Co. v. FPC, 434 U.S. 414, 422-23 (1952) (The Federal Power Commission must assure an abundant supply of electricity throughout the United States to protect the public interest).

161. *See* Otter Tail Power Co. v. United States, 410 U.S. 366, 369 (1973) (finding towns which could accommodate only one distribution system, made each town a "natural monopoly" for the distribution and sale of power by power company).

162. *Coates*, 354 Md. at 506, 731 A.2d at 934.

roads. Trees, fences, ponds, and other common occurrences observed on private property pose the same foreseeability of harm to passengers deviating from the roadway as do utility poles. The implication would require landowners to cut down trees, fill in ponds, and remove other obstacles in order to create a "landing pad" for vehicles which leave the road for any number of reasons.

The court has previously recognized that "care must be taken to avoid unduly burdening an occupant of land in the use of land."[163] The rule has been that an abutting landowner is charged with the duty to use reasonable care so that nothing originating on his or her property creates a danger to travelers on an adjacent road.[164] This includes the maintenance of trees and vegetation.[165]

An extension of liability to private landowners for travelers deviating from the road is overly burdensome. Such requirements on a private landowner's use and enjoyment of his property would amount to a governmental taking and would require compensation.[166] A landowner should not be subjected to liability by virtue of his property's location to a road.

The potential costs to society go far beyond the infringement on private land owner's rights and the estimated expense of removal and relocation of utility poles. Imposing liability on landowners with obstructions located just off the traveled roadway jeopardizes a number of widespread activities which have important societal benefits.

It appears to be common practice to locate poles, fire hydrants, parking meters, street lights, and the like, along roadways.[167] These items have the same potential to cause injury to deviating motorists as do utility poles. The possibility of extending tort liability to the owners of such items is too incredible to be rationally considered.

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163. *Rosenblatt*, 335 Md. at 77, 642 A.2d at 189.

164. *See* Hensley v. Montgomery County, 25 Md. App. 361, 364, 334 A.2d 542, 544 (1975).

165. *Id.* at 369-70, 334 A.2d at 547 (holding that urban land owners' duty to inspect for dead, dying or decaying trees does not extend to owner of "suburban forest" land).

166. *See* Hayes v. Malken, 26 N.Y.2d 295, 299 (1970) (finding no liability for a collision with a utility pole located on private property because such a holding would entitle a driver "swerving off the road and striking an object entirely on private property" to "bring an action against the landowner and have a jury pass on whether the placement of the object, regardless of its distance from the road, was such as to create an unreasonable danger to travelers." This entitlement would effectively act, in the court's opinion, as a restriction on land use "equivalent to a taking . . . without just compensation.").

167. *See, e.g., id.* at 298 (denying compensation to a driver whose car struck a pole that was approximately seven inches from the edge of the road and was located on private property behind a two-inch granite header).

As a final policy consideration, it is relevant to note that the appellant in this case was not precluded from recovery by the court's refusal to hold SMECO liable. The main purpose of tort law is to compensate innocent parties, returning them to the position they were at before their injury.[168] Appellant, in this case, is seeking recovery for injury to her innocent family members. The fact that the appellant has been precluded from compensation by SMECO does not keep her from receiving compensation altogether. Appellant may still seek recovery against the negligent driver of the vehicle involved in the accident.[169] Whether or not this party is solvent should not be of importance to the court. The financial situation of the responsible party is not justification for the court to award liability against the "deep pocket" in order to assure substantial monetary compensation.

Because duty has been defined as "an expression of the sum total of . . . considerations of policy which lead the law to say that the plaintiff is entitled to protection,"[170] the court could have relied upon a detailed discussion of public policy to better justify its finding of no duty. Although these economic policies are an important factor that should be considered by the court in its denial of liability against SMECO, it is not common legal practice for a court to base its decisions solely upon policy considerations.[171] It was understandable, then, that the court was reluctant to base its decision upon these considerations without an additional legal theory supported by case law and precedent. The Court of Appeals could have reached its policy motivated conclusion by considering the other elements of negligence, specifically the lack of breach or the lack of proximate cause. While it is understandable that the court did not want to leave these

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168. KEETON ET AL., *supra* note 81, § 1, at 5-6.

169. *See supra* note 26-27 and accompanying text. In fact, appellant not only sought recovery from Thompson but was awarded summary judgment against Thompson for his negligent driving of the automobile. *Coates*, 354 Md. at 504, 721 A.2d at 933. Damages had yet to be awarded at the time of this decision.

170. KEETON ET AL., *supra* note 81, § 53, at 358. Prosser explains that determining duty requires a conclusion as to whether the plaintiff's interests are entitled to legal protection against the defendants conduct. As such, duty is "as broad as the whole law of negligence," and that there is no all inclusive, universal test for it. *Id.* § 53, at 357-58; *see* Lake, *supra* note 81, at 1523 (finding that American courts adhere to the idea that duty is a conclusion which must be analyzed in terms of public policy, social considerations, and/or other such factors).

171. *See* Lake, *supra* note 81, at 1528 (stating that court decisions that rest upon unpopular policy balancing are at risk of reversal in the legislature).

questions for the jury, the court could have ruled on them as a matter of law.[172]

c. A Determination on Breach of Duty.—The court could have focused on the second element of a negligence cause of action, breach of duty. The *Coates* court could have reached its same conclusion by finding that the breach of duty element was not satisfied. A rejection of this element would have been justified and of greater strength than its no duty determination.

Proving that SMECO breached its duty of reasonable care would have required a showing that the utility did not act in the same manner that a reasonable, prudent utility company would have under the same circumstances.[173] The circumstances of this case do not support the conclusion that all locations along a given road carry an equal risk of vehicle deviation. While the frequency of off-road collisions is indicative of the general likelihood that a crash may occur, the probability of an off-road deviation at any particular place along a road is not equally apparent.

The court determined that a particular deviation may be foreseeable based on the condition and topography of the road, the proximity of the pole to the traveled portion of the road, other site conditions, and previous incidents.[174] These considerations, however, are more determinative of the reasonableness of a utility's pole placement.[175] Assignment of liability based on this type of analysis is predicated on whether or not the utility, in its placement of a pole at a location with some degree of foreseeable danger, was unreasonable, so as to breach its duty, or within the scope of reasonability.[176]

Olivers Shop Road was a two-lane, rural county highway, described as "hilly and twisty."[177] This road was without a shoulder and contained numerous curves and steep grades.[178] Because of these

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172. Bush v. Northern Indiana Pub. Serv. Co., 685 N.E.2d 174, 178 (1997) (stating that when only a single conclusion can be drawn from the facts, the question becomes a matter of law).

173. *See generally* KEETON ET AL., *supra* note 81, § 33, at 193. That duty would have been one of reasonable care in the placement of its utility pole.

174. *See supra* note 102 and accompanying text.

175. *McMillan*, 393 N.W.2d at 338 (stating that the conditions of a highway are critical in determining whether the location of a utility pole adjacent to that highway is unreasonable).

176. *See id.* at 338 (stating that negligent placement of a utility pole is a question of whether the place chosen is so dangerous and the danger is so needless that the choice becomes unreasonable).

177. *See supra* note 7.

178. Brief for Appellant at 3, *Coates* (No. 100).

road conditions and the increased likelihood that an accident could occur on this type of road, it is reasonable to hold SMECO to an increased level of responsibility.[179]

SMECO chose to locate its utility pole outside the traveled portion of the road and on the inside of a left curve.[180] Appellant's expert, Dr. Wright, opined that it was unwise to "put poles that close to the road especially in the vicinity of curves."[181] While Dr. Wright's observation may be true, his criticism does not take into account the nature of Olivers Shop Road and the fact that there is no safe place to construct a utility pole on hilly, twisty, curvy roads.[182] The fact that SMECO's pole was not located in a completely safe spot is not an indication of negligence per se. Negligence can only be assigned if the appellant can prove that SMECO's actions were inconsistent with those of a reasonable, prudent utility company. When a utility is forced to decide where to place a utility pole along an inherently dangerous road, the placement itself is the determinant of reasonableness.

Appellant's claim that SMECO's placement was unreasonable is weakened by the testimony of its second expert. St. Clair noted that when a road contains a left curve, the best and safest place for a pole is on the inside of the curve.[183] The fact that SMECO situated its pole on the inside of the left curve is indicative of the utility's reasonable and prudent consideration of where to construct a pole on this inherently dangerous road.

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179. *See supra* notes 175-176 and accompanying text; *see also* KEETON ET AL., *supra* note 81, § 31, at 169-70 (explaining that situational facts within the acting party's knowledge which increase the probability of injury to another may establish a duty to guard against the recognized risk). Simply stated, the obvious nature of the road added to the probability of an accident. The fact that SMECO was or should have been aware of these characteristics when deciding where to construct its utility pole calls for a more stringent examination of the reasonableness of its ultimate placement of the pole.

180. *See Coates*, 354 Md. at 507, 731 A.2d at 935.

181. *See supra* note 25 and accompanying text.

182. *See* Mayor of Cumberland v. Turney, 177 Md. 297, 309-10, 9 A.2d 561, 566 (1939) (finding negligence can not be inferred from the mere fact that a road or street is unsafe, and that absolute safety can not be obtained except at prohibitive or impractical cost, especially in the case of steep, narrow, winding roads). On certain types of roadways, especially those in rural or mountainous areas, there is a greater threat of accidents. Because this increase in risk is not the result of negligence, the limits of discretionary decisions delegated to utilities for the construction of public improvements when those improvements are inherently and unavoidably dangerous are naturally questioned. *Id.*; *see also* Albin v. National Bank of Commerce, 375 P.2d 487, 491 (Wa. 1962) (reasoning that there is a marked distinction between the duty, with reference to trees, that may be imposed upon the owners of land adjacent to city streets or heavily traveled highways and those imposed on owners of forest land adjacent to little-used roads).

183. *See supra* note 31 and accompanying text.

Moreover, the reasonableness of the pole location is supported by the fact that the pole had been located at the site for thirty-seven years, and there had been only one known accident.[184] It would be irrational to factually conclude that the pole was placed in an unreasonably dangerous spot given the amount of traffic traversing the road without incident.[185] The reasonableness of the location is further corroborated by the fact that Thompson had traveled past the pole without incident numerous times before the accident.[186]

While the court looked at these external circumstances as an indication that the utility owed no duty to reasonably place the pole, in anticipation of this particular deviation, it seems more appropriate for this information to have been considered in a "breach of duty" context. These factors are more indicative of the reasonableness of SMECO's pole placement decision, and go less to the foreseeability of harm resulting from the defendant's actions.[187]

Clearly, the utility took into account the inherent dangers of the road itself while attempting to place the pole in a safe location along an unsafe roadway. Therefore, it would be inappropriate to say that SMECO failed to act reasonably in its placement of the utility pole. As such, the court would have been justified in a denial of liability based on the absence of a breach.

d. Absence of Proximate Cause.—The court could also have focused its decision on the third element of a negligence cause of action. The court would have had a strong position in its denial of liability had it relied upon the argument that SMECO's placement of the utility pole was not the proximate cause of the appellant's injury.

A utility company should be entitled to anticipate that travelers on "hazardous" roads will use them in a lawful and reasonable manner.[188] Maryland law has held that a motorist on a public road is re-

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184. *See supra* note 31 and accompanying text.

185. If SMECO had unreasonably placed the pole, a high toll of accidents would have been likely given the number of cars traversing the road over the 37 years the pole was in existence.

186. Thompson's knowledge of the road could further be used prove his contributory negligence, despite its irrelevance to the present case. *See Coates*, 354 Md. at 526, 731 A.2d at 945.

187. It seems counterintuitive to state that no duty was owed in the utility's placement based on factors such as experience, which may be considered only after the pole has been located for some time.

188. *Coates*, 354 Md. at 525, 731 A.2d at 945; *see also* Bush v. Northern Indiana Pub. Serv. Co., 685 N.E.2d 174, 178 (Ind. 1997) (finding that a utility is only required to anticipate the ordinary and normal use of the highway and is not required to anticipate and to guard against the illegal or reckless conduct of motorists); *see also* Armand v. Louisiana Power &

quired to exercise due care and caution when driving.[189] Individuals with knowledge of a defective road condition must use due care and caution while utilizing those roads.[190] Failure to avoid a known, obvious danger in a road has been held to be contributory negligence per se.[191]

While the question as to whether a driver's act of contributory negligence can be imputed to his passengers is moot in this case,[192] a determination as to the causation of plaintiff's injuries is not.[193] The negligent placement of a utility pole is not actionable unless it, without the intervention of any independent factor, causes the harm complained of.[194]

The cause of the accident in this case can not be attributed to the pole alone.[195] Thompson had traveled Olivers Shop Road without incident frequently, over many years, and was well aware of its terrain and inherent dangers.[196] While Thompson claims to have slowed to "between 25 and 30 miles per hour" in order to negotiate the left curve, appellant's expert determined the "critical speed at which a vehicle can transverse the curve without leaving the roadway on the outside of the curve" was 52 to 56 miles per hour.[197] The fact that the vehicle left the road under these circumstances, in conjunction with the rainy weather and the condition of the vehicle's tires, point to the driver's erratic behavior as the cause of the accident.

Light Co., 482 So. 2d 802, 804 (La. Ct. App. 1986) (stating that a motorist has a duty to control an automobile and maintain a proper lookout).

189. *See* Mason v. Baltimore, 137 Md. 476, 112 A. 818 (1921) (denying compensation to an automobilist, who crashed into a rising safety gate when he had a chance to stop, knew of the bridge, knew that it was going to open, but attempted to outrun the opening of the draw of a bridge).

190. *See* County Comm'rs of Kent County v. Pardee, 151 Md. 68, 77, 134 A. 33, 36 (1926) (stating that when roads "become, to a greater or less extent, defective, the public does not necessarily assume all the risk attendant upon using them after it acquires knowledge of the defects, but is only required to use due care and caution, taking into consideration the nature and extent of the defects").

191. *See id.*

192. *See supra* notes 52-53 and accompanying text. Utilizing the precedent set in *Earp*, the contributory negligence of Thompson can not be imputed upon his passengers because he was not their agent or servant. *Earp*, 120 Md. at 293, 87 A. at 810.

193. *See supra* notes 43-44 and accompanying text.

194. Parsons v. Chesapeake & Potomac Tel. Co., 181 Md. 502, 505, 30 A.2d 788, 790 (1943) (citing Holler v. Lowery, 175 Md. 149, 161, 200 A. 353, 358 (1938)).

195. *See supra* notes 9, 10 and accompanying text and *infra* note 197 and accompanying text.

196. *See Coates*, 354 Md. at 526, 731 A.2d at 945.

197. *Id.* at 506, 731 A.2d at 934.

The facts clearly indicate that the position and maintenance of the pole were not the proximate cause of the crash.[198] Rather, multiple superseding events appear to be the proximate cause of the plaintiff's injuries. Even though defendant's pole placement may have originally set in motion the chain of events which led to the injury, this chain was severed by separate, independent acts.[199] Superseding causes that are nonconcurrent and are, by themselves, the "natural and logical cause of the harm" are considered outside the doctrine of proximate cause.[200] When these superseding causes arise, the original act becomes a remote cause and the subsequent, independent act becomes the proximate cause of the accident.[201] Therefore, the court could have found that SMECO was not negligent based on the fact that the causation requirement for a negligence cause of action was not satisfied.

5. Conclusion.—The cost-benefit analysis applied to the *Coates* case shows the extent of the burden on the defendant and the consequences to the community of imposing a duty upon utility operators would greatly outweigh the minimal safety benefits yielded by such a policy. Tort law is the body of principles that determines when an individual who suffers personal injuries may shift that loss to another.[202] However, the cost of that loss should not be spread to the detriment of the public when a utility makes a reasonable placement of a pole which does not interfere with the ordinary use of the road. The public policy concerns inherent in holding a utility liable should have been given greater consideration by the court. Because it is unusual for a court to base its conclusion solely upon policy considera-

198. *See* Shapiro v. Toyota Motor Co. Ltd., 248 S.E.2d 868 (N.C. 1978). In this case, a passenger in an automobile brought suit when the car in which he was traveling left the road in a 35 mile per hour zone at an intersection known as "dead man's curve" and crashed into a telephone pole which had been struck some seven times since 1967. The Court of Appeals for North Carolina entered summary judgment for the telephone company finding that "the pole would not have been struck had the Toyota been operated in a proper manner. Thus, the maintenance of the pole did not constitute an act of negligence." *Id.* at 871; *see also* Peninsular Tel. Co. v. Marks, 198 So. 330 (Fla. 1940) (denying liability upon a finding that the negligence of the driver, and not the location of a telephone pole located approximately 3 feet off of a sharp curve, was the proximate cause of the accident).

199. Bush v. Northern Indiana Pub. Serv. Co., 685 N.E.2d 174, 178 (Ind. 1997) (finding that plaintiff's reckless driving and excessive speed were superseding events which broke the causal chain).

200. *Parsons*, 181 Md. at 505, 30 A.2d at 790 (internal quotation marks omitted) (quoting A.L.I. RESTATEMENT OF LAW OF NEGLIGENCE, §§ 440, 441, 447).

201. *Bush*, 685 N.E.2d at 178.

202. *See* TORT LAW AND THE PUBLIC INTEREST 17 (Peter H. Schuck ed., 1991).

tions, the court could have considered the elements of a negligence claim. The court did, in fact, focus on the element of duty. However, findings on either breach of duty or proximate cause would have been stronger than the court's no duty determination.

MICHAEL STRANDE

C. *Landlord's Duty Extended to Protect Tenant's Guest from Vicious Dogs Within the Leased Premises*

In *Matthews v. Amberwood Associates L.P., Inc.*,[1] the Court of Appeals of Maryland considered whether the landlord of an apartment complex owes a duty to the guest of a tenant who is injured or killed by a "highly dangerous pit bull dog"[2] while in the tenant's apartment.[3] The court answered in the affirmative, ruling that a landlord did owe such a duty "when the landlord knew of the dog's presence and was aware of the dog's dangerousness, when the presence of the dog was in violation of the lease, and where the landlord could have taken steps to abate the danger."[4] In resolving this issue of first impression in Maryland,[5] the court extended the reach of tort duty beyond dangerous rental premise conditions to include instrumentalities brought into the apartment by the tenant.[6] As a result, the court unnecessarily broadened and clouded a landlord's duty to police a tenant's actions within the premises and provides a disincentive for including "no pets" clauses in leases.

1. The Case.—On February 9, 1994, Shanita Matthews and her sixteen-month-old son Tevin visited Ms. Matthews's friend Shelly Morton and her five-year-old son at Morton's apartment.[7] While Ms. Morton was away from the apartment for a moment, her boyfriend's pit bull, Rampage, attacked Tevin while the two young boys played in the living room.[8] Rampage bit into Tevin's neck and shook him vio-

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1. 351 Md. 544, 719 A.2d 119 (1998).

2. *Id.* at 548, 719 A.2d at 120. While this Note does not examine the debate over the classification of pit bulls and whether they are inherently vicious, these issues are always a backdrop when confronting cases of this sort. *See infra* notes 58, 114 & 155 (reviewing the court's efforts to establish per se viciousness of pit bulls); *see also Matthews*, 544 Md. at 586-87, 719 A.2d at 139-40 (Chasanow, J., dissenting) (pointing out the possible misnomer in using the term "pit bull" in the instant case because the dog involved was a Staffordshire bull terrier rather than an American Pit Bull terrier); Russell G. Donaldson, Annotation, *Validity and Construction of Statute, Ordinance, or Regulation Applying to Specific Dog Breeds, Such as "Pit Bulls" or "Bull Terriers,"* 80 A.L.R.4th 70, 76 (1990) (noting that, in classifying "Pit Bulls," there is "inherent confusion in identification of the particular allegedly dangerous breed among several breeds similar in appearance or name or both").

3. *See Matthews*, 351 Md. at 548, 719 A.2d at 120.

4. *Id.*

5. *See* Amberwood Assocs. v. Matthews, 115 Md. App. 510, 516, 694 A.2d 131, 134 (1997), *rev'd*, 351 Md. 544, 719 A.2d 119 (1998) (noting that this issue "is one of first impression in Maryland").

6. *See Matthews*, 351 Md. at 563, 719 A.2d at 128 (stating that the imposition of this duty on a landlord is supported by *Shields v. Wagman*, 350 Md. 666, 714 A.2d 881 (1998), which involved an attack on parties in the common areas of a rental property).

7. *See id.* at 550, 719 A.2d at 121-22.

8. *See id.*, 719 A.2d at 122.

lently.[9] After extraordinary effort, including stabbing the dog several times with a knife, Ms. Morton and Ms. Matthews were able to make Rampage release the boy.[10] Tragically, Tevin suffered fatal injuries, dying approximately one hour after arriving at the hospital.[11] Tevin's parents filed negligence claims against Morton's landlords Amberwood Associates and Monocle Management, Ltd. (Amberwood), alleging that Amberwood "owe[d] a duty of care to visitors when the landlord has knowledge of a vicious animal on its premises and the ability to take reasonable steps to protect against the animal."[12] In all, four counts were filed against Amberwood.[13] Ms. Matthews and Andre T. Williams, Tevin's father, filed a wrongful death action.[14] In addition, Ms. Matthews filed a survival action on behalf of Tevin's estate, an individual count for "shock, fright, alarm, anxiety, emotional distress, and physical and psychological pain and suffering" and a count for the defendant's "reckless infliction of emotional distress" upon Ms. Matthews.[15]

Amberwood countered that it owed no such duty, did not know that Rampage was vicious, and could not have prevented the harm even if it did know and have such a duty.[16] Three days before the trial date, Amberwood filed an amended answer that, *inter alia*, added the affirmative defenses of Ms. Matthew's contributory negligence and assumption of risk.[17] The trial court, however, struck down these amendments.[18]

The case was bifurcated, and a jury trial was held on the issue of liability in the Circuit Court for Baltimore City.[19] At trial, both parties presented evidence on the question of whether Rampage was a vicious dog.[20] Matthews contended that Rampage "constituted a known dangerous condition upon the property and that Amberwood retained control over the presence of the pit bull within the leased premises

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9. *See id.*

10. *See id.*

11. *See id.* at 551, 719 A.2d at 122.

12. *Id.* at 552, 719 A.2d at 123.

13. *See id.* at 551, 719 A.2d at 122.

14. *See id.*

15. *Id.* (internal quotation marks omitted).

16. *See* Appellees' Brief at 29-30, Matthews v. Amberwood Assocs., 351 Md. 544, 719 A.2d 119 (1998) (No. 97-76) (arguing that eviction of the tenant and the dog would not have prevented the attack on the tenant's friend's son, who would have visited Morton regardless of where she lived).

17. *See Matthews*, 351 Md. at 551, 719 A.2d at 122.

18. *See id.*

19. *See id.*

20. *See id.*

through the 'no pets' clause in the lease."[21] Matthews also argued Amberwood owed "a duty of care to protect Matthews and her son from that extremely dangerous animal."[22] Amberwood's maintenance personnel were examined to determine whether knowledge of the vicious dog's presence could be imputed to Amberwood.[23] Ultimately, the jury found Amberwood liable and awarded damages amounting to over $7.3 million.[24]

Amberwood appealed to the Court of Special Appeals, which reversed the trial court's ruling.[25] The Court of Special Appeals held that the trial court erred as to the landlord's liability,[26] concluding that a "no pets" clause in the tenant's lease did not create a duty of care in the landlord for the tenant's social invitee.[27] Judge Sonner, writing for the court, employed the policy discussions from the leading California case *Uccello v. Laudenslayer*,[28] which the trial court had considered analogous to *Matthews*.[29] Although the court recognized the important policy concerns articulated in *Uccello*, it concluded that the landlord did not owe a duty of care.[30] Further, the court pointed out that Rampage was a nuisance brought into the premises by the tenant, and the "no pets" clause of the lease was for the landlord's benefit only.[31]

The Court of Special Appeals construed the "no pets" clause as contemplating damage to property, not injury to people.[32] Applying the tenets of contract law, the court opined that a landlord may waive a lease provision that benefits the landlord without incurring tort liability.[33] Alternately, the court found that even if the landlord owed a

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21. *Id.* at 553, 719 A.2d at 123.

22. *Id.*

23. *See id.* at 549-50, 719 A.2d at 121.

24. *See id.* at 552, 719 A.2d at 122.

25. *See* Amberwood Assocs. L.P., Inc. v. Matthews, 115 Md. App. 510, 514, 694 A.2d 131, 133 (1997), *rev'd*, 351 Md. 544, 719 A.2d 119 (1998).

26. *See id.*

27. *See id.* at 513, 694 A.2d at 133.

28. 118 Cal. Rptr. 741, 748 (Cal. Ct. App. 1975) (holding that a duty of care arises "when the landlord has actual knowledge of the animal, coupled with the right to have it removed from the premises"); *see also infra* notes 59-66 and accompanying text (describing the facts of *Uccello*).

29. *See Amberwood*, 115 Md. App. at 517, 694 A.2d at 134-35.

30. *See id.* at 522, 694 A.2d at 137 (explaining that imposing a duty in this situation "would . . . chill a myriad of contract clauses that protect landlords and their property").

31. *See Amberwood*, 115 Md. App. at 520-21, 694 A.2d at 136 ("Clauses in lease contracts creating a duty on the part of tenant to the landlord, unless specifically designed to do so, do not create obligations on the part of landlords to third parties.").

32. *See id.* at 520, 694 A.2d at 136.

33. *See id.* at 521, 694 A.2d at 136-37 (stating that "the beneficiary of a clause has no obligation to enforce the contract provision, but could waive the provision by his conduct.

duty of care to the tenant's invitees, its failure to enforce the "no pets" clause of the lease did not proximately cause Tevin's death, since Ms. Matthews's and Ms. Morton's actions were intervening and superseding causes.[34] The court thus reversed the trial court's ruling on the issues of wrongful death and Ms. Matthew's survival action on behalf of Tevin's estate.[35] Matthews appealed to the Court of Appeals, which granted certiorari to review the judgment of the intermediate appellate court.[36]

2. Legal Background.—Maryland law relating to landlord/tenant relationships is grounded in common law doctrines of property and contract rights.[37] In the past several decades, however, the relationship has been defined to a greater extent by civil tort duties arising out of the lease provisions that provide exceptions to the traditional rule of total landlord immunity.[38]

a. The Common Law Standards.—With respect to the private areas of the leased premises, the traditional rule of landlord liability flows from the notion that "where property is demised, and at the time of the demise it is not a nuisance, and becomes so *only* by the act of the tenant while in his possession . . . the owner is not liable."[39]

In this case, the landlords, who were the beneficiaries of the 'no pets' clause, had no duty to third parties to enforce the rule" (internal citation omitted)).

34. *See id.* at 522, 694 A.2d at 137 (noting that the trial court erred in refusing to permit the jury to consider potential intervening and superseding causes of Tevin's death).

35. *See id.* at 523, 694 A.2d at 138 (holding that the trial court erred in attributing liability to the Landlord and reversing the judgment on the first and second issues of liability claimed by the plaintiff).

36. *See Matthews*, 351 Md. at 552, 719 A.2d at 123.

37. *See* ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 4:1, at 186 (1980) ("[T]he condition of the premises at the commencement of the lease has been governed by the doctrine of *caveat emptor*, and the common law imposed no obligation on the lessor, in absense of an express agreement, to repair defects . . . arising during the tenancy." (footnote omitted)).

38. *See Matthews*, 351 Md. at 555-56, 719 A.2d at 124 (describing the circumstantial exceptions to landlord immunity that give rise to tort duty); *infra* notes 41-45 and accompanying text; *see also* Danny R. Veilleux, Annotation, *Landlord's Liability to Third Person for Injury Resulting from Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant*, 87 A.L.R.4th 1004, 1012-13 (1991) (reviewing different jurisdictions' limits on liability for the landlord and the control mechanism of imputing liability); 4 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 14:76, at 257-58 & n.49 (1987) (describing instances in which a landlord has been held liable for the retention of tenants whose vicious animals have injured third parties).

39. Owings v. Jones, 9 Md. 108, 117-118 (1856); *see also* Marshall v. Price, 162 Md. 687, 689, 161 A. 172, 173 (1932) (applying the rule that "[i]f a landlord demise premises which are not in themselves a nuisance, but may or may not become such, according to the manner in which they are used by the tenant, the landlord will not be liable for a nuisance created on the premise by the tenant").

The rationale behind this rule is that the landlord has parted with control of the premises.[40] There are, however, exceptions to this general rule of landlord immunity.[41] Landlords may be liable if they are contractually obligated to rectify dangerous or defective conditions but fail to do so,[42] voluntarily undertake to rectify a dangerous or defective condition but do so negligently,[43] or if there are dangerous or defective conditions on the premises that violate statutes or ordinances.[44] Although contract law does not impute liability through failure to enforce a term of the contract,[45] a tort duty has nevertheless emerged in some states in the last couple decades through suits based upon unenforced prohibitions in the lease contract.[46] A few states have actually gone beyond the duty of the landlord to the tenant and guests through the terms of the lease to a general duty of reasonable care.[47]

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40. *See* SCHOSHINSKI, *supra* note 37, § 4.1, at 186 ("The basic rationale for lessor immunity has been that the lease is a conveyance of property which ends the lessor's control over the premises . . . .").

41. *See Matthews*, 351 Md. at 555-56, 719 A.2d at 124 (surveying cases in which courts have held landlords liable for failing to complete promised corrections to known dangerous conditions); *see also* 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 27.16, at 271-300 (2d ed. 1986) (surveying the various theories of recovery for individuals injured on the premises of another).

42. *See* Sacks v. Pleasant, 253 Md. 40, 44-46, 251 A.2d 858, 861-62 (1969) (holding that a landlord is liable for an injury sustained inside an apartment when the landlord, although under no contractual duty, promises to fix a dangerous condition but does not do so).

43. *See* Miller v. Howard, 206 Md. 148, 155, 110 A.2d 683, 686 (1955) (holding that a landlord who inadequately filled in an excavation in the tenant's yard was liable for the tenant's guest's injuries, even though the landlord voluntarily made the repairs and was not contractually bound to do so).

44. *See* Richwind Joint Venture 4 v. Brunson, 335 Md. 661, 672, 645 A.2d 1147, 1152 (1994) (concluding that "a private cause of action in a landlord/tenant context can arise from a violation of any statutory duty or implied warranty created by the Baltimore City Code").

45. *See* Amberwood Assocs. v. Matthews, 115 Md. App. 510, 521, 694 A.2d 131, 136-37 (1997), *rev'd*, 351 Md. 544, 719 A.2d 119 (1998) (stating that "[c]ontract law provides that the beneficiary of a clause has no obligation to enforce the contract provision, but could waive the provision by his conduct" (citing John B. Robeson Assocs., Inc. v. Gardens of Faith, Inc., 226 Md. 215, 172 A.2d 529, (1961))).

46. *See* Veilleux, *supra* note 38, at 1023 (reviewing cases that have held landlords liable for injuries sustained by third parties when they were attacked by dogs on leased premises, based on the landlord's right or duty to terminate leases because of the presence of the animal on the premises); *see also* 4 SPEISER, *supra* note 38, § 14:76, at 257-58 (classifying dog bite cases as instances where a landlord may be liable for negligently selecting and retaining tenants who may create a risk to the public by their activities).

47. *See* 5 HARPER ET AL., *supra* note 41, § 27.16, at 293-95 (describing the process by which first exceptions are created for the general principle of landlord immunity, as well as how, in New Hampshire, California, Wisconsin, Massachusetts, Florida, Idaho, and Nevada, the immunities and exceptions, such as the "control" exception described in this Note, have been abandoned in favor of general negligence principles).

b. Emerging Tort Duty.—In determining whether to assign a tort duty to a party, the Court of Appeals of Maryland has considered the relationship that exists between the parties and the nature of the harm likely to result from the failure to exercise due care.[48] The courts have stated as a general rule that a landlord is not ordinarily liable to a tenant or guest of a tenant for injuries from a hazardous condition in the leased premises that comes into existence after the tenant has taken possession.[49] The landlord's duty, however, is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection, and exceptions to immunity are made."[50] The common thread in determining a landlord's duty is the "landlord's ability to exercise a degree of control over the defective or dangerous condition and to take steps to prevent injuries arising therefrom."[51] This theory of a control-based duty is an expansion from traditional common law principles, especially when considering hazardous conditions *created by* the tenant on the property.[52] Maryland law holds a landlord liable for injuries that

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48. *See* Village of Cross Keys, Inc. v. United States Gypsum Co., 315 Md. 741, 752, 556 A.2d 1126, 1131 (1989) (noting that in previous cases, "we discussed the relationship of the parties and the nature of the actual or foreseeable harm in a given case as additional factors to be considered in determination of the existence of a duty"); Jacques v. First Nat'l Bank, 307 Md. 527, 534-35, 515 A.2d 756, 759-60 (1986) ("In determining whether a tort duty should be recognized in a particular context, two major considerations are: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties.").

49. *See* Marshall v. Price, 162 Md. 687, 689, 161 A. 172, 172 (1932) ("[W]hen the owner has parted with his control, the tenant has the burden of proper keeping of the premises, in the absence of an agreement to the contrary; and for any nuisance created by the tenant the landlord is not responsible.").

50. *Jacques*, 307 Md. at 533, 515 A.2d at 759 (internal quotation marks omitted) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (5th ed. 1984)).

51. *Matthews*, 351 Md. at 557, 719 A.2d at 125. In *Richwind*, the Court of Appeals adopted the formulation provided by RESTATEMENT (SECOND) OF PROPERTY § 17.6 (1977), which states that

> [a] landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant . . . by dangerous condition existing before or arising after tenant has taken possession if [the landlord] has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:
>
> (1) an implied warranty of habitability or
>
> (2) a duty created by statute or administrative regulation.

Richwind, 335 Md. at 672, 645 A.2d at 1152.

52. The Maryland courts have not found landlords responsible for nuisances created on the leased property by the tenant that cause injuries to third parties. *See* State v. Feldstein, 207 Md. 20, 113 A.2d 100 (1955) (finding no landlord liability for the death of a tenant's family from asphyxiation from a tenant's faulty water heater installation); *see also supra* note 49 and accompanying text.

result from a defective condition on his property if, and only if, "the landlord either knows or has reason to know of the condition and has a reasonable opportunity to correct it."[53] A landlord has a "reasonable opportunity to correct" a condition when he retains control over the premises.[54]

Although *Matthews* was the first case in Maryland to address the issue of landlord liability regarding dangerous animals within the rental premises, one year prior, the Court of Appeals decided *Shields v. Wagman*,[55] which involved two separate attacks in a common area parking lot by a pit bull that had escaped from inside the rental premises immediately prior to the attacks.[56] In finding that the landlord had a duty to a business invitee and a co-tenant who were attacked by the dog, the court determined that the landlord could have prevented the foreseeable harm in the common area by refusing to renew the lease with the tenant after the landlord became aware of the vicious nature of the tenant's dog and the tenant's inability to control it.[57] This case reflects a shift from a view of landlord control based solely on the landlord's control and maintenance of the common area.

c. Other Jurisdictions' Responses to Dangerous Animals and a Landlord's Duty.—Due to public health concerns over vicious dog attacks, many states have passed laws regarding the owning, harboring, and keeping of dogs.[58] In addition, some states have judicially extended liability to landlords when dogs have attacked co-tenants and guests on the leased premises.

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53. *Richwind*, 335 Md. at 673, 645 A.2d at 1153.

54. *See* Langley Park v. Lund, 234 Md. 402, 407, 199 A.2d 620, 623 (1964) (observing that since a landlord retained control over parts of the property for the common use of all tenants, he had a duty of "ordinary care and diligence to *maintain* the retained portions in a reasonably safe condition" (emphasis added)).

55. 350 Md. 666, 714 A.2d 881 (1998).

56. *See id.* at 670-72, 714 A.2d at 883.

57. *See id.* at 690, 714 A.2d at 892-93. The court concluded that a lack of control was demonstrated by the fact that the dog was kept in a chicken-wire cage, was let loose during walks, and was let loose in the office when members of the public were there. *Id.* at 670, 714 A.2d at 882.

58. *See Matthews*, 351 Md. at 561-63 & n.4, 719 A.2d at 126-27 (noting that "[a] number of states or municipalities, recognizing the unique danger pit bull dogs pose to their citizens, have enacted legislation that classify pit bull dogs as vicious" (citation omitted)); *see also* 4 AM. JUR. 2D *Animals* § 101, at 438 (discussing statutes abrogating the necessity of scienter in vicious dog bite cases). *See generally* Ward Miller, *Modern Status of Rule of Absolute or Strict Liability for Dogbite*, 51 A.L.R.4th 446 (1987) (reviewing common law and statutory principles of liability for dogbites); John P. Ludington, *Who "Harbors" or "Keeps" Dog Under Animal Liability Statute*, 64 A.L.R.4th 963 (1988) (chronicalling the statutory history of liability founded on the keeper or harborer of a dog).

In *Uccello v. Laudenslayer*,[59] a German shepherd bit a tenant's child invitee within the premises of a leased apartment.[60] The dog was normally penned in the back yard but it went into the kitchen area through an open door and bit the child.[61] The dog's owner had not properly controlled it in the past, and it had attacked and bitten two other individuals previously.[62] California's Court of Appeal, Fifth District, concluded that the landlord had a duty to the injured child because of the landlord's ability to remove the dog from the premises by not renewing the lease and evicting both the tenant and the dog,[63] despite the fact that the landlord had expressly given permission for the tenant to keep the dog on the premises.[64] The court reasoned that when the landlord has control over property to the extent that "it fairly may be concluded that he can obviate the presence of the dangerous animal and he has knowledge thereof, an enlightened public policy requires the imposition of a duty of ordinary care."[65] The court further explained that "[t]o permit a landlord in such a situation to sit idly by in the face of the known danger to others must be deemed socially and legally unaccepted."[66]

The Court of Appeals of New York reached a similar result in *Strunk v. Zoltanski*.[67] In *Strunk*, the court denied a motion for summary judgment by a landlord whose tenant's guest was injured by a German Shepherd.[68] The court held that when a landlord with knowledge of a tenant's vicious dog enters into a lease, and the landlord fails to take appropriate precautions by adding conditions to the lease that would better ensure the tenant's control over the dog, the

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59. 118 Cal. Rptr. 3d 741 (Cal. Ct. App. 1975).

60. *See id.* at 743-44. The apartment was leased on a month-to-month basis. *See id.* at 744.

61. *See id.* at 743-44.

62. *See id.* (chronicling the four separate attacks on three children and a neighbor, and describing how thirty neighbors had signed a petition to get the dog removed from the neighborhood).

63. *See id.* at 748 ("[O]nly when the landlord has actual knowledge of the animal, coupled with the right to have it removed from the premises, does a duty of care arise . . . . [The landlord] could have abated the harboring of the dog on the premises by terminating the tenancy.").

64. *See id.* at 744.

65. *Id.* at 746.

66. *Id.*

67. 468 N.E.2d 13, 14 (N.Y. 1984) (holding that a landlord may be held liable to persons bitten on the premises when the landlord leases to a tenant whom the landlord knows will keep a vicious dog on the premises and the landlord fails to insert pertinent provisions in the lease to protect persons who might be on the premises).

68. *See id.* at 14.

landlord may be held liable for injuries to third parties.[69] The court explained that while a landlord "would not be subject to the same strict liability to which a tenant as harborer of the dog would be subject . . . landlords as others must exercise reasonable care not to expose third person to an unreasonable risk of harm."[70] The court also noted that a tenant may have a legitimate interest in keeping a watch or guard dog, and that "the proper accommodation of these interests" would require a landlord to establish, through the lease, provisions that would ensure "confinement or control of the dog."[71]

A contrasting result, however, was reached by the Washington State Supreme Court in *Frobig v. Gordon.*[72] The court held that a landlord was not liable when a tiger kept by an animal handling company attacked a helper during a television commercial shoot.[73] Explicitly rejecting the *Uccello* approach, the court applied common law principles and concluded that "a landlord is not responsible . . . for conditions which develop or are created by the tenant after possession has been transferred."[74] Thus, because the landlord would not be liable to the tenant for the tiger's attack, the court reasoned that the landlord should not be liable to third parties for such an attack.[75]

Finally, in *Alaskan Village, Inc. v. Smalley*,[76] the Supreme Court of Alaska considered whether a landlord owed a duty to a tenant attacked by a dog owned by a fellow tenant in that tenant's backyard[77] where the landlord included a lease provision specifically prohibiting vicious dogs.[78] The court answered in the affirmative, explaining that the co-tenant "was entitled to rely on . . . [the landlord] to perform its duty."[79] The court reached this conclusion because, in light of a previous attack involving the same animal, it was foreseeable that a person would be harmed, the landlord's "blatant disregard of its tenant's safety is morally blameworthy," it would support a policy of encourag-

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69. *See id.* at 15 (stating that "at a time when . . . [the landlord] had complete control of the premises she leased them to the tenant . . . [and] took no measures by pertinent provisions in the lease or otherwise to protect third persons who might be on the premises from being attacked by the dog").

70. *Id.*

71. *Id.* at 16.

72. 881 P.2d 226 (Wash. 1994).

73. *See id.* at 228.

74. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 6, at 434 (5th ed. 1984)).

75. *See id.* at 229.

76. 720 P.2d 945 (Alaska 1986).

77. *See id.* at 947.

78. *See id.* at 946.

79. *Id.* at 948.

ing landlords to enforce their own rules, and "landlords may obtain insurance or require tenants that own vicious animals to do so."[80]

3. The Court's Reasoning.—In *Matthews v. Amberwood Associates*,[81] the Court of Appeals held that a landlord of an apartment complex owes a duty to social guests of a tenant who are injured or killed in the tenant's apartment by a highly dangerous pit bull dog kept by the tenant.[82] The duty arises (1) when the landlord knows of the dog's presence and is aware of the dog's viciousness, (2) when the presence of the dog is in violation of the lease, and (3) where the landlord can take steps to abate the danger through lease enforcement and, ultimately, eviction.[83] The Court of Appeals also held that there was sufficient evidence in this case to find that the landlord had a duty to protect a tenant's invitee from harm caused by the vicious dog within the tenant's apartment.[84] Writing for the majority, Judge Eldridge first established that a landlord's duty arises partially from his "ability to exercise a degree of control over [a] defective or dangerous condition and to take steps to prevent injuries arising therefrom."[85] The court also noted that the landlord's duty with regard to matters within his control extends beyond common areas and "may be applicable to conditions in the leased premises."[86] In applying these principles to the present case, the court concluded that Amberwood had a duty to protect third parties from a tenant's dogs.[87]

The court looked for guidance from states outside of Maryland.[88] The court noted the rule expressed in *Strunk v. Zoltanski*[89] that

> with respect to the liability of a landlord whose tenant comes into possession of the animal after the premises have been leased, in order to establish liability it must be shown that the landlord had knowledge of the vicious propensities of the

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80. *Id.*

81. 351 Md. 544, 719 A.2d 119.

82. *See id.* at 570, 719 A.2d at 131-32.

83. *See id.* Another significant issue that the Court of Appeals decided, which is not within the scope of this Note, was whether Ms. Matthews was entitled to recover damages for emotional distress during her struggle with the dog, while it attacked Tevin, although she did not suffer any physical injury. *Id.* at 570-75, 719 A.2d at 132-34. Despite the fact that she suffered no physical injury, the court found that "Matthews obviously suffered real and severe emotional distress during the attack . . . . She was entitled to recover damages for such emotional distress." *Id.* at 574, 719 A.2d at 134.

84. *See id.* at 565-66, 719 A.2d at 129.

85. *Id.* at 557, 719 A.2d at 125.

86. *Id.*

87. *See id.* at 566, 719 A.2d at 129.

88. *See id.* at 566-70, 719 A.2d at 129-31; *see also infra* note 101.

89. 468 N.E.2d 13 (N.Y. 1984); *see also supra* note 67 and accompanying text.

> dog and had control of the premises or other capability to remove or confine the animal . . . .[90]

The court found that the landlord's power to evict through a violation of the lease gave it the ability to remove the dog from the premises and, consequently, to prevent the death which occurred.[91] Although the court recognized that there was no guarantee that Amberwood would have successfully evicted Morton prior to the attack, the majority pointed out that Amberwood would have fulfilled its duty by "promptly institut[ing] an eviction proceeding," regardless of the outcome.[92] Amberwood, however, did not enforce the "no pets clause" in any manner.[93] The court also conceded that Morton's harboring of the dog may have constituted negligence on her part, but, nevertheless, noted that "the insertion in a lease of a restriction against . . . offensive conduct is precisely for the purpose of enabling the landlord to control that conduct."[94]

The court then asserted that "the forseeability of harm [also] supports the imposition of a duty on the landlord."[95] The court reasoned that harm to the tenant's guest by the dog in this case was "entirely foreseeable" because of the testimony by several employees of Amberwood to the effect that they had seen the dog, were afraid of the dog, and had witnessed attacks by the dog.[96] The court also noted that "[t]he extreme dangerousness of this breed, as it has evolved today, is well recognized."[97]

The court analogized this case to its most recent decision involving pit bulls and a landlord's duty in *Shields v. Wagman*.[98] Although the court recognized that the attack in *Shields* had occurred in a common area, unlike the attack in the present case, which occurred in the leased premises, it concluded that "this difference is . . . not very significant in light of the circumstances of both cases."[99] The court reasoned that *Shields* was not a case about a defective or dangerous

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90. *Matthews*, 544 Md. at 567, 719 A.2d at 130 (internal quotation marks omitted) (quoting *Strunk*, 468 N.E.2d at 15).

91. *See id.* at 558-59, 719 A.2d at 125-26.

92. *Id.* at 559 n.3, 719 A.2d at 126.

93. *See id.* at 558-59, 719 A.2d at 125-26 (stating that "[t]he record in this case, however, shows that the landlord did nothing").

94. *Id.* at 560, 719 A.2d at 126 (internal quotation marks omitted) (quoting Bocchini v. Gorn Management Co., 69 Md. App. 1, 12, 515 A.2d 1179, 1185 (1986)).

95. *Id.* at 560, 719 A.2d at 127.

96. *See id.* at 561, 719 A.2d at 127.

97. *Id.*

98. *See id.* at 563-65, 714 A.2d at 128-29; *see also supra* notes 55-57 and accompanying text (discussing the *Shields* decision).

99. *Matthews*, 351 Md. at 565, 719 A.2d at 129.

condition in a common area.[100] The "control" factor relied on in *Shields*, according to the *Matthews* majority, did not concern the control the landlord exercised over the common area, but instead, like the case at hand, involved "the landlord's control over the tenant's remaining in the leased premises."[101] The court also pointed out that both the death in this case and the injuries in Shields "arose *from* the leased premises."[102]

Finally, the court explained that the "landlord's retention in the lease of some control over particular matters in the leased premises is, standing alone, [not] a sufficient basis to impose a duty on the land-

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100. *See id.*

101. *Id.*; *see also id.* at 566-70, 719 A.2d at 129-31 (considering the persuasive authority of the following state courts and cases: Uccello v. Laudenslayer, 118 Cal. App. 3d 741 (Ct. App. 1975) (holding that a landlord who knows of vicious propensities of animal kept on leased premises, gave express permission to harbor vicious dog, and who could abate harboring of the animal by terminating month-to-month tenancy owes duty of care to tenant's invitees and may be held liable for injuries inflicted by animal.); Strunk v. Zoltanski, 468 N.E.2d 13 (N.Y. 1984) (holding that a landlord who leases to a tenant with knowledge that the tenant will keep a vicious dog on the premises, without taking reasonable measures, by pertinent provisions in the lease, to protect persons who might be on the premises, may be held liable to a person who is thereafter bitten on the premise.); Giaculli v. Bright, 584 So. 2d 187 (Fla. Dist. Ct. App. 1991) (reversing summary judgment for the landlord when it was on notice of the tenant's pit bull's vicious propensity and it had sufficient time to further control the dog prior to its attacking a child); Alaskan Village, Inc. v. Smalley, 720 P.2d 945 (Alaska 1986) (holding the landlord liable for the tenant's dog attack because "no vicious dogs" clause in lease demonstrated obvious intent and power to control dogs on the leased property); Arrington Funeral Home v. Taylor, 474 S.W.2d 299 (Tex. Civ. App. 1971) (holding that a corporation is liable to a person injured by a vicious dog on premises owned, controlled, and partially used in the furtherance of the business of the corporation, where the corporation has given its permission and consent to its employee to keep and to harbor the dog on such premises); Szkodzinski v. Griffin, 431 N.W.2d 51 (Mich. Ct. App. 1988) (affirming summary judgment for the leasor when there is no question of fact that the leasor did not know that its tenant's dog had attacked a child within an enclosed yard was vicious); Gallick v. Barto, 828 F. Supp. 1168, 1174-75 (M.D. Pa. 1993) (denying summary judgment for the landlord and finding that the landlord may be held liable to the tenant's guest who was bitten by the tenant's ferret because the landlord knew that the ferret was a wild animal and the landlord could control the premises through a "No Pets" clause in the lease); McDonald v. Talbott, 447 S.W.2d 84, 85 (Ky. Ct. App. 1969) (finding that the landlord can be liable for attacks by the tenant's vicious dog on areas of the property open to the public when the landlord has foreknowledge of dangers to visitors); Lucas v. Kriska, 522 N.E.2d 736, 737 (Ill. App. Ct. 1988) (refusing to find a property owner liable for a child's dog bite because the landlord had no foreknowledge of dog's viciousness); McCullough v. Bozarth, 442 N.W.2d 201, 208 (Neb. 1989) (holding that the landlord is liable when he has actual knowledge of viciousness and nevertheless leases the premises to the dog's owner); and Parker v. Sutton, 594 N.E.2d 659, 662 (Ohio Ct. App. 1991) (holding that a landlord who exercises no control over the tenant's vicious dog is not liable for injury to third parties, if the landlord believed the dog had been killed or if the landlord did not have reasonable time to abate the dangerous condition)).

102. *Id.* at 565, 719 A.2d at 129.

lord which is owed to a guest on the premises."[103] Instead, the ultimate question of whether to impose a duty of reasonable care in this case would have to be answered by "weighing the various policy considerations."[104] According to the court, the policy considerations at issue here were whether the tenant exercised primary control over the leased premises, the public safety concerns regarding the harboring of a dangerous animal within the leased premises, the degree of control exercised by the landlord, and the landlord's knowledge and ability to abate the dangerous condition.[105] Taking this consideration into account, the court concluded that it agreed with "the majority of courts addressing this issue in other states . . . that the balance should be struck on the side of imposing a duty on the landlord which is owed to guests on the premises."[106]

Judges Chasanow, Cathell, and Rodowsky dissented, arguing that the intermediate court's ruling should be affirmed.[107] In reaching his conclusion, Judge Chasanow relied on several factors, including the landlord's inability to control Rampage's actions within the leased premise and the landlord's inability to evict Ms. Morton for owning a dog.[108] Based on these factors, Judge Chasanow opined that the landlord owed no duty of care to a tenant's invitee to protect them against vicious animals kept on the premises.[109]

4. Analysis.—In *Matthews*, the Court of Appeals recognized, for the first time, a landlord's duty to protect its tenant's guests from vicious pit bull dogs within the tenant's premises.[110] The court found that the landlord breached its duty when it did not make efforts to eliminate this source of harm by removing the dog through the contractual power of eviction from the "no pets" clause in the lease.[111] The Court of Appeals has never before held a landlord liable for injuries inside the premises to the guest of a tenant caused by an instru-

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103. *Id.*

104. *See id.* at 566, 719 A.2d at 129 (internal quotation marks omitted) (quoting Rosenblatt v. Exxon, 335 Md. 58, 77, 642 A.2d 180, 189 (1994)).

105. *See id.*

106. *Id.*

107. *See id.* at 583-84, 719 A.2d at 138 (Rodowsky, J., dissenting) (Chasanow, J., dissenting).

108. *See id.* at 610, 719 A.2d at 151 (Chasanow, J., dissenting) (arguing that "[e]ven if the landlord knew the dog had vicious tendencies, the landlord should be able to assume that when the dog was confined within the tenant's apartment that the tenant would take reasonable precautions to protect guests in her home").

109. *See id.* In addition, he noted that Ms. Matthew's actions could constitute an intervening superseding cause. *Id.* at 614, 719 A.2d at 153.

110. *See id.* at 566, 719 A.2d at 129.

111. *See id.* at 570, 719 A.2d at 131-32.

mentality brought onto the land by the tenant after taking possession of the property.[112] Nevertheless, in an effort to control the public's exposure[113] to often-dangerous pit bull dogs,[114] the court over-extended the landlord's duty into the unforeseeable interactions between tenant, guest, and pet within a secured premises.[115] The court unfairly derived landlord liability from the lease's "no pets" clause,[116] basing the landlord's duty on a misleading concept of landlord "control" over the leased premises,[117] and overstated Rampage's viciousness and the foreseeability of harm within the premises.[118] The court's interpretation of premise control merely provides landlords with a disincentive for including lease terms pertaining to pets. Such a tenuous standard will not satisfy the court's stated policy of preventing future pit bull attacks.

a. The "No Pets" Clause: Purpose and Intended Beneficiaries.— Arriving at the "no pets" clause as the source of the landlord's ability to have prevented the harm in this case, the court adopted an impractical and attenuated standard for determining a landlord's duty of care to its tenant's guests.[119] The court agreed with Matthew's argu-

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112. *See id.* at 614, 719 A.2d at 153 (Chasanow, J., dissenting) (concluding that landlord negligence in Maryland "has never included failure to protect a tenant's social guests from things exclusively under the tenant's control within the tenant's dwelling"); *cf.* 1 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES §§ 10.105a-10.501a, at 665-711 (4th ed. 1997) (contrasting the concept of landlord negligence for failure to abate the tenant's creation of a nuisance or for negligently entrusting the tenant, into which Friedman places dog bite cases, with the landlord's liability in tort for breaching a covenant to repair dangerous conditions within the leased premises).

113. *See Matthews*, 351 Md. at 566, 719 A.2d at 129 (setting up a weighing of privacy issues verses the threat of public safety in arguing for landlord liability).

114. The court came close to establishing a per se viciousness standard for pit bulls. *See id.* at 561-63 & n.4, 719 A.2d at 126-28 & n.4 (reviewing case law and pit bull-prohibiting statutes from other states in finding that "the extreme dangerousness of this breed . . . is well recognized").

115. While the court stated that "[t]he facts here unequivocally indicate that harm to a tenant's guest by Rampage was entirely foreseeable" based on the dog's behavior as observed by apartment maintenance personnel, *id.* at 561, 719 A.2d at 127, Judge Chasanow stated, in his dissent, that "[e]ven if the landlord knew the dog had vicious tendencies, the landlord should be able to assume that when the dog was confined within the tenant's apartment that the tenant would take reasonable precautions to protect guests in her home." *Id.* at 610, 719 A.2d at 151; *see also infra* Part 4.c (arguing that given the facts in *Matthews*, the landlord should not have been held to a foreseeability standard).

116. *See infra* Part 4.a.

117. *See Matthews*, 351 Md. at 565, 719 A.2d at 129 (adopting a definition of "control"); *see also infra* Part 4.b (arguing that the *Matthews* court should have distinguished the facts of *Shields* and that by not doing so, it created an over-broad definition of "control").

118. *See infra* Part 4.c.

119. The standard is especially impractical regarding non-privity-holding third parties that have not entered into identical lease agreements (i.e. co-tenant third parties).

ment that although the "no pets" clause did not create the duty of care for third parties, it gave the landlord an element of control over whether the pit bull was on the premises, and, by not exercising this control, the landlord breached its duty of care.[120] In examining the basis for landlord duty, however, it is unwise to divorce the method for landlord control—the "no pets" clause—from the purpose and intended beneficiary of that control.

The purpose of a "no pets" clause is to prevent property damage in the apartments and the intended beneficiary is the landlord.[121] The *Amberwood* clause does not clearly demonstrate an intent on the landlord's part to control a dangerous condition.[122] Furthermore, the dog attacked a tenant's guest, not a co-tenant.[123] The arguments for creating a duty in co-tenant cases are more convincing because a tenant who signs a lease with a "no pets" clause has a reasonable expectation that no pets, including dogs, will be encountered on or in a neighbor's premises.[124] A guest, however, has no such contractual notice and no such expectation. Nevertheless, the court concluded that non-enforcement of the "no pets" clause caused Tevin's death.[125] This conclusion by the court begs the question of whether a landlord could simply release himself from liability by eliminating the "no pets" clause.[126]

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120. *See Matthews*, 351 Md. at 570, 719 A.2d at 131-32.

121. *See id.* at 603-04, 719 A.2d at 148 (Chasanow, J., dissenting) (distinguishing the "no vicious dogs" clause in the *Alaskan Village* lease, with the "no pets" clause in *Matthews* by noting that "the *Alaskan Village* lease could much more reasonably be found to be intended to keep tenants safe; whereas the lease in the present case could just as likely be intended to protect the landlord's property").

122. Amberwood Assocs. L.P., Inc. v. Matthews, 115 Md. App. 510, 520, 694 A.2d 131, 136 (1996) ("The Amberwood ['no pets' clause] did not contemplate the harm that an animal might do to people, only the harm it can do to the premises."), *rev'd*, 351 Md. 554, 719 A.2d 119 (1998).

123. *See Matthews*, 351 Md. at 550, 719 A.2d at 121-22.

124. *See* Alaskan Village, Inc. v. Smalley, 720 P.2d 945, 948 (Alaska 1986) (noting that the landlord had agreed that he had an obligation to enforce the rules concerning pets for the safety of the tenants, and that the co-tenants were "entitled to rely on [the landlord] to perform its duty"); *see also Matthews*, 351 Md. at 604, 719 A.2d at 148 (Chasanow, J., dissenting) (noting that "unlike in [*Matthews*], the plaintiffs in *Alaskan Village* were tenants and, thus, more likely to be the intended beneficiaries of the lease provision").

125. *See Matthews*, 351 Md. at 558-59, 719 A.2d at 125-26.

126. Herein lie the problems with the creation of both the "fiction devised to meet the case" of control through a lease term covenant or contract and the creative "ingenious theories" to fit landlord actions into the control exception to general landlord immunity. W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS § 63, at 444 (5th ed. Supp. 1988); *see also* SCHOSHINSKI, *supra* note 37, § 4:4, at 192 ("Resorting to the fiction of 'retained control' to support liability under a covenant to repair has been justly criticized by the commentators."). The court would accomplish more by either pushing the law in situations like *Matthews* either towards a more explicit "intended beneficiaries," contract-

b. The Unruly Concept of Control.—The court erroneously extrapolated from a landlord's duty to maintain and to control the common areas[127] and the physical premises,[128] and to prevent nuisances from within the premises from disturbing co-tenants,[129] to the landlord's ability to control tenant-harbored animals within the secured premises.[130] Significantly, Judge Chasanow, who dissented in *Matthews*, authored the *Shields v. Wagman* opinion, where he stated that the "issue is not whether . . . [the pit bull] was being kept in the common area, but rather whether . . . [the pit bull's] presence posed a

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based standard as in *Alaskan Village*, or towards general negligence principles that take into consideration the totality of the landlord's knowledge and powers, not just the attenuated link between a "no pets" clause and the control exception to landlord immunity. *See generally* 5 HARPER ET AL., *supra* note 41, § 27.16.4, at 293-95 (discussing the emergence in the past three decades of general negligence principles in landlord/tenant law in New Hampshire, California, and other states, and specifically citing *Uccello* as demonstrative of this shift from the landlord immunity and exceptions paradigm).

127. *See Matthews*, 351 Md. at 553-55, 719 A.2d at 123-24 (discussing a type of control premised on the control a landlord maintains over the common areas); *see also* 5 HARPER ET AL., *supra* note 41, § 27.17, at 295 (stating that "[t]he duty owed by a landlord to tenants and their visitors with respect to . . . [common areas], which the landlord retains in his possession for the use of his tenants, is sharply different from the duty owed with reference to the leased premises themselves: It is the full duty of reasonable care to make conditions reasonably safe" (footnote omitted)).

The *Restatement* states:

> [a] landlord who leases a part of his property and retains in his own control any other part the tenant is entitled to use as appurtenant to the part leased to him, is subject to liability to his [tenant's guests] for physical harm caused by dangerous condition upon that part of the leased property retained in the landlord's control.

2 RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) § 17.3 (1977).

128. *See Matthews*, 351 Md. at 557, 719 A.2d at 125 (stating that "the principle that the landlord may have a duty with regard to matters within his control extends beyond common areas; it may be applicable to conditions in the leased premises"). This theory of tort liability follows from a retained control through a covenant to repair. *See generally* KEETON ET AL., *supra* note 126, § 63, at 442 ("[Common areas duty] may even extend into the portion of the premises leased to the tenant, provided that the landlord has retained control over the aspect of the premises responsible for the injury." (footnote omitted)).

129. *See Matthews*, 351 Md. at 560, 719 A.2d at 126-27. Traditionally, this theory has been used to recover for injuries outside of the premises. The *Restatement* states:

> A lessor of land is subject to liability for a nuisance caused by an activity carried on upon the land while the lease continues . . . if the lessor would be liable if he had carried on the activity himself, and (a) at the time of the lease the lessor consents to the activity or knows of or has reason to know that it will be carried on, and (b) he then knows or should know that it will necessarily involve or is already causing the nuisance.

See RESTATEMENT (SECOND) OF TORTS § 837(1) (1968).

130. The ramifications of the holding in this case are disturbing because the tenant's guest, her child, and the pit bull were within a secured premise when the attack occurred. *See Matthews*, 351 Md. at 550, 719 A.2d at 121-22. Also, there was no evidence of an agent of the landlord observing the pit bull acting aggressively towards guests of the tenant within the premises. *See id.* at 549-50, 719 A.2d at 121.

threat to those in the common area."[131] The location of the injury should correspond to the area of the premises in which the landlord may foresee the harm. The issue of common area duty verses on-premises duty should be a valid demarcation line between *Matthews* and *Shields*. In its attempt to analogize the facts of *Shields*, however, the court made two overly broad assertions. First, the court stated that "[t]he 'control' factor upon which the Court relied in *Shields* was not the traditional control over common areas. Rather, as in the instant case, it was the landlords' control over the tenant's remaining in the leased premises."[132] The court did not recognize, however, that the facts of *Shields* are distinguishable in that if the dog had been properly confined to the premises, the two attacks would not have occurred. Rampage, on the other hand, was confined within the premises when the attack occurred.

Second, the *Matthews* court stated that "[b]oth the injuries in *Shields* and the injuries and death in the present case arose *from* the leased premises."[133] The court made a logical leap when it extrapolated from the lack of control in keeping a dog confined on-premises in *Shields* to the lack of control over the dog's behavior on-premises in *Matthews*. The court could have provided a stronger and more predictable standard by following the precedent in *Shields*,[134] and the persuasive authority of *Uccello v. Laudenslayer*,[135] and *Alaskan Village v. Smalley*[136] in a different fashion, looking at the inability of the tenants in those cases to control the dog and the landlord's knowledge through complaints and actual knowledge that the tenant was not controlling the dog by chaining, penning, muzzling or otherwise securing them in the premises.[137]

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131. Shields v. Wagman, 350 Md. 666, 678, 714 A.2d 881, 886-87 (1998) (differentiating between where a dog is kept and where it poses a threat to invitees and co-tenants and holding that the landlord had a duty of care to a business invitee and a co-tenant when the tenant's pit bull attacked and bit them in the common area where the landlord had knowledge of the potential danger in the common area and had the ability to rid the premises of that danger by refusing to re-let the premises).

132. *Matthews*, 351 Md. at 565, 719 A.2d at 129.

133. *Id.*

134. *See supra* notes 55-57 and accompanying text (describing the facts and the court's holding in *Shields*).

135. 118 Cal. Rptr. 3d 741 (Ct. App. 1975).

136. 720 P.2d 945 (Alaska 1986).

137. In *Uccello*, the landlord actually gave the keeper of the dog (the tenant) special permission to have the vicious dog on the premises. 118 Cal. Rptr. at 744. This is a troubling case to rely on because the aspect of control was not derived from a "no pets" clause in the lease, as it was in *Matthews*. Instead, the court in *Uccello* reasoned that the landlord retained control because the case involved a month-to-month lease that could have been easily broken after either of the first two attacks by the dog. *Id.* at 746-47. In *Alaskan*

In addition, when confronting the control issue, the court should have distinguished between eviction on one hand, and either not entering into a lease with a vicious dog owner or choosing not to renew a lease with the owner on the other. Both *Uccello* and *Strunk v. Zolantski*[138] were based on the landlord's renewing or entering into a lease with foreknowledge that a vicious dog would be harbored on the premises.[139] In fact, the court in *Strunk* explicitly stated that landlord "control" of the premises is absolute at the time of lease renewal and found it dispositive that there were no lease provisions implemented by the landlord to further protect third parties on the premises from the vicious dog.[140] In contrast, the property in *Matthews* was demised without the foreknowledge of a vicious dog and there *was* a lease provision for "no pets."[141] In the final calculation, the court should have concentrated on how the landlord assures that dogs are controlled on the premises so as to prevent injury to the public rather than how landlords control animals by eliminating both the animal and the keeper from the premises.

c. Viciousness Standard and Unforeseeable Actions Within Premises.—The court in *Matthews* stated that the facts of the case "unequivocally indicate that harm to a tenant's guest by Rampage was entirely foreseeable."[142] The foreseeability of harm, however, is more problematic than the court would like to admit because the attack occurred within a secured apartment.[143] Short of defining a pit bull dog as a per se vicious animal, which the court does not do, the court should have recognized Rampage's watchdog-like behavior.[144] The landlord's maintenance men witnessed the dog's behavior while

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Village, the court noted that "[t]here was ample evidence that . . . [the landlord] had actual knowledge of prior incidents involving [the dogs at issue]." 720 P.2d at 948.

138. 468 N.E.2d 13 (N.Y. 1984).

139. *See supra* notes 59-62 and accompanying text (describing the foreknowledge that landlord had when renewing a month-to-month lease in *Uccello*); *supra* note 69 and accompanying text (describing the *Strunk* landlord's foreknowledge when initiating a lease).

140. *Strunk*, 468 N.E.2d at 15.

141. *Matthews*, 351 Md. at 558, 719 A.2d at 125 ("The landlord retained control over the presence of a dog in the leased premises by virtue of the 'no pets' clause in the lease.").

142. *Id.* at 561, 719 A.2d at 127.

143. *See id.* at 550, 719 A.2d at 121-22. The issue of landlord foreseeability in this case is made all the more untenable by the fact that Ms. Matthews and her child had visited with Ms. Morton and Rampage on dozens of previous occasions. *See id.* at 586, 719 A.2d at 139 (Chasanow, J., dissenting).

144. The dissent recognized that "there may be tenants who have a legitimate desire to keep watch dogs or guard dogs for the protection of their person or property, and this practice is not necessarily to be discouraged if the tenant keeps the dog . . . confined to the tenant's premises." *Matthews*, 351 Md. at 610, 719 A.2d at 151 (Chasanow, J., dissenting).

guarding the house from intruders, not while inside the apartment,[145] playing with children.[146] Instead, all of Rampage's "vicious" behavior was observed during what may be considered boundary disputes between itself and the maintenance people and other individuals in the apartment and common areas of the complex.[147]

Where the *tenant* is not adequately controlling the dog and there is a threat to individuals in the common areas, then a landlord's duty should arise because it is foreseeable that the dog will come into contact with co-tenants, invitees, or guests in an injurious manner.[148] In *Matthews*, however, the attack took place in the home where Rampage was kept.[149] In this sense, the *Shields* case is not analogous. Although the *Matthews* court argued that *Shields* is not a common area case,[150] the holding hinged on whether the "landlord has knowledge of the potential danger in the common area."[151] In *Matthews*, because the landlord did not know that Rampage would be allowed to intermingle with guests without some protection,[152] there was little foreseeability of harm to guests inside the premises.

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145. Even if Rampage was a vicious dog, his confinement within the apartment at the time of the attack was in compliance with the local code. *See* BALTIMORE CITY CODE art. 11, § 30(d) (1983) (providing that "every vicious or dangerous animal, as defined in this subtitle, shall be confined by the owner within a building or secure enclosure, and shall be securely caged or muzzled and leashed whenever off the premises of its owner").

146. *See Matthews*, 351 Md. at 550, 719 A.2d at 121-22.

147. *See* Joint Record Abstract at E355-E371, Amberwood Assoc L.P., Inc. v. Matthews, 115 Md. App. 510, 694 A.2d 131 (1997). Ms. Matthews used the testimony of an apartment maintenance worker, Mr. Monroe, who witnessed the dog's behavior on numerous occasions, to demonstrate the dog's viciousness. *See id.* The dog's behavior included the following: growling on the other side of the door when Monroe went to the apartment to perform a service call, *id.* at E357; hitting the other side of an interior door when Monroe was inside the apartment performing a service call, *id.* at E358; growling and barking at passersby and attempting to jump the fence in the front yard, *id.* at E362-368; and breaking its chain and jumping the fence to pursue a boy who walked by the front yard, *id.* at E366-367. Each of these instances involve the dog reacting towards people on the other side of a door or fence, in the typical manner of a watch dog. None of the instances imputes any knowledge of the dog's behavior within the premises among its keeper and her guests.

148. *See, e.g.*, Alaskan Village, Inc. v. Smalley, 720 P.2d 945, 947-48 (Alaska 1986) (imposing a duty where the dogs involved climbed over a fence in their owner's yard and attacked a six-year-old child, and the landlord had actual knowledge of prior incidents involving the dogs); Uccello v. Laudenslayer, 118 Cal. Rptr. 741, 744 (Ct. App. 1975) (finding the harm inflicted by the dog's attack foreseeable where the dog had already attacked and bitten two other people).

149. *See Matthews*, 351 Md. at 550, 719 A.2d at 121-22.

150. *See id.* at 565, 719 A.2d at 129 (arguing that "unlike the common area cases in this Court, the failure of the landlords in *Shields* was not a failure to rectify a dangerous condition in the common area").

151. Shields v. Wagman, 350 Md. 666, 690, 714 A.2d 881, 892 (1998).

152. Ms. Morton testified at trial that the day of the attack was the first instance in which Rampage was not muzzled. *See* Amberwood Assocs. Ltd. v. Matthews, 115 Md. App. 510,

Landlords in Maryland will now be caught in a Catch-22 between including a "no pets" clause in the lease and assuming tort duty, as in *Matthews*, or excluding and expunging the clauses when initiating or renewing leases, since this is the control mechanism in which the court now determines breach of duty. Landlords who attempt to avoid the "no pets" clause, however, possibly still face the type of liability found in *Strunk* where no controls were written into the lease.[153] The court's holding surely frustrates the landlord and its insurer's perception of risk and liability by failing to provide a uniform and anticipatory standard for landlords with similar dilemmas. In the end, the court is creating policy-based law vis-à-vis the shifting of pecuniary burdens from tenants to landlords and their insurers.[154]

5. Conclusion.—In *Matthews*, the Court of Appeals incorrectly held that a landlord's duty of care for its tenant's guests extends to abating the dangerous condition of an inherently dangerous pit bull within the premises.[155] By extending the reach of tort duty beyond the dangerous conditions of the rental premises itself, to include a dog brought into the apartment by the tenant,[156] after initiation of the lease containing a "no pets" clause, the court created a new breach of landlord duty based on the landlord's "control" of the premises through unenforced lease prohibitions. The court's determination unnecessarily complicates a landlord's duty to police a ten-

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515, 694 A.2d 131, 133-34 (1997). Also, the Court of Special Appeals of Maryland concluded that "Ms. Matthews knew that Rampage was usually chained and muzzled while in the apartment." *Id.* at 515, 694 A.2d at 138. These facts further demonstrate the impracticable requirement that a landlord foresee the manner in which a tenant protects their guests from a dog confined within the premises. *Cf.* 5 HARPER ET AL., *supra* note 41, § 27.16, at 278 (noting how landlords that make initial disclosures of hazards to tenants have no further duty towards those who enter the premises because of the "relinquishment of possession and control, the impossibility of standing guard so as to warn those who visit").

153. *See supra* notes 67-71 (describing the New York court's finding of landlord liability because no animal control was written into the lease).

154. *See Matthews*, 351 Md. at 584, 719 A.2d at 138 (Chasanow, J., dissenting) (stating that "[p]erhaps the worst tragedy [of the majority's decision] is the implication that rich landlords and sympathetic victims are judged by totally different standards"); *see also* Clemmons v. Fidler, 791 P.2d 260 (Wash. 1990) (concluding, after rejecting the *Uccello* approach, that "[o]ur rule also promotes the salutary policy of placing responsibility where it belongs, rather than fostering a search for a defendant whose affluence is more apparent than his culpability").

155. *Matthews*, 351 Md. at 570, 719 A.2d at 131 (observing that pit bulls are an extremely dangerous breed).

156. *See id.* at 563, 719 A.2d at 128 (stating that the court's holding in *Matthews* is supported by the duty of the landlord established in *Shields*).

ant's actions within the premises, provides an incentive to expunge "no pets" clauses from leases, and yet provides a disincentive to lease to pet owners.

WADE B. WILSON

Recent Decisions

The United States Court of Appeals for the Fourth Circuit

I. BANKRUPTCY

A. Debtors Must "Turn Square Corners" when Navigating Sovereign Immunity in Bankruptcy

In *In re NVR, LP*[1] the United States Court of Appeals for the Fourth Circuit denied a chapter 11 debtor a judicial forum and thereby allowed the states of Maryland and Pennsylvania to keep approximately seven million dollars worth of transfer and recording taxes[2] that two federal courts previously held were not owed to the States under federal law.[3] The court held that the States' exercise of sovereign immunity shielded them from the bankruptcy proceeding initiated by the debtor to facilitate a refund of the taxes that the debtor paid during their reorganization, but were exempted under the Bankruptcy Code.[4] The court affirmed its previous holding in *Schlossberg v. Maryland*[5] that section 106 of the Bankruptcy Code[6] unconstitutionally attempts to abrogate state sovereign immunity in bankruptcy proceedings because it was not enacted pursuant to Congress's Fourteenth Amendment enforcement power.[7] The court then found that the section 9014[8] proceeding initiated by NVR was a "suit" and was thus covered by Eleventh Amendment sovereign immunity.[9]

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1. 189 F.3d 442 (4th Cir. 1999).

2. *Id.* at 454.

3. *See id.* at 447 (noting that both the bankruptcy court and the district court found that 11 U.S.C. § 1146(c) (Supp. 1999) exempted NVR from the taxes throughout the bankruptcy period).

4. *In re NVR*, 189 F.3d at 454.

5. Schlossberg v. Maryland (*In re* Creative Goldsmiths), 119 F.3d 1140 (4th Cir. 1997).

6. 11 U.S.C. § 106 (Supp. 1999), entitled "Waiver of Sovereign Immunity," states, "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . the Federal Rules of Bankruptcy Procedure." *Id.*

7. *See In re NVR*, 189 F.3d at 450. In *Schlossberg*, the Fourth Circuit held that "[b]ecause there is no evidence that Congress either passed the Bankruptcy Code under § 5 of the Fourteenth Amendment or sought to preserve the core values specifically enumerated in that amendment, . . . Congress' effort to abrogate the states' Eleventh Amendment immunity through its 1994 enactment of 11 U.S.C. § 106(a) is unconstitutional and ineffective." *Schlossberg*, 119 F.3d at 114.

8. 11 U.S.C. § 9014 (Supp. 1999), titled "Contested Matters," permits the debtor to reopen the bankruptcy proceedings to get clarification on a matter in dispute. *Id.*

9. *In re NVR*, 189 F.3d at 454.

These findings settled the issues between the debtor and the two states. Because local taxing authorities do not enjoy sovereign immunity,[10] however, the court went on to discuss the tax exemption clause embodied in section 1146(c)[11] and held that property transfers taking place before the confirmation of the bankruptcy plan were not covered by the tax exemption.[12]

This decision correctly follows the literal meaning of binding authority and Fourth Circuit precedent. However, it illustrates the complexity and pitfalls that parties face when they assert federally created rights against the states in federal court.[13] While the opinion makes clear that NVR cannot recover the tax, section 1146(c) exempted in federal court,[14] it provides no guidance for how future debtors can obtain relief. After the Supreme Court strengthened the state's sovereign immunity in the landmark case *Seminole Tribe v. Florida*,[15] the courts of the Fourth Circuit have attempted to balance equitably the rights of private litigants against the state's sovereign immunity.[16] This opinion, however, offers no guidance for future debtors with federal causes of action against the states and further muddles the Fourth Circuit's jurisprudence after *Seminole Tribe*.[17]

1. The Case.—NVR was a leading homebuilder in Maryland and Virginia throughout the 1980s.[18] NVR took on substantial debt when

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10. *See id.*

11. 11 U.S.C. § 1146(c) (Supp. 1999), titled "Special Tax Provisions," provides that all stamp and recording taxes are exempt from state and local taxation. *Id.*

12. *See In re NVR*, 189 F.3d at 458.

13. Federally created rights fare no better in state court since the Supreme Court clarified that states can also claim sovereign immunity from suits arising under federal law in their own state courts. *See* Alden v. Maine, 119 S. Ct. 2240, 2267-68 (1999) (holding that states can refuse to open their courts to certain suits brought against the states by litigants holding federally created rights).

14. *See id.* at 454 (stating that "[b]ecause NVR 'commenced or prosecuted' a suit against the states, sovereign immunity applies and the suit is barred as to the states").

15. 517 U.S. 44 (1996) (discussing states' immunity from claims brought against them in federal court by private citizens).

16. *See In re NVR*, 189 F.3d at 451-54 (considering whether a state is immune from a suit brought to recover repayment of exempt transfer and recordation taxes); *In re Collins*, 173 F.3d 924, 931 (4th Cir. 1999) (finding that the state was not immune under the Eleventh Amendment from a debtor's suit to reopen a bankruptcy case to determine whether debt owed to the state was dischargeable); Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1999) (holding that sovereign immunity did not apply to proceedings to confirm a chapter 11 reorganization plan); Schlossberg v. Maryland (*In re* Creative Goldsmiths), 119 F.3d 1140, 1147 (4th Cir. 1997) (finding that a state is immune from a suit seeking a return of property from the state).

17. *See infra* Part 4 and accompanying text (describing how the court's opinion fails to provide guidance to those who seek to pursue claims against states).

18. *See In re NVR*, 189 F.3d at 447.

it acquired Ryan Homes in 1987 in an effort to expand its operations.[19] Due to declining operating margins in the late 1980s and early 1990s, NVR had difficulties servicing its debt and, consequently, in 1992 sought reorganization under a Chapter 11 bankruptcy proceeding.[20]

The bankruptcy court permitted NVR to continue its operations while it developed its reorganization plan.[21] By allowing NVR to continue its operations during the bankruptcy period, NVR generated sufficient revenues to "convince the market that NVR had a viable Plan, and a viable future."[22] NVR's transfers of properties during the bankruptcy proceeding prevented its creditors from liquidating its assets.[23] The transfers were crucial to NVR's reorganization, the satisfaction of its creditors, its re-incorporation, and its rapid emergence from bankruptcy as a viable tax revenue producing entity. According to NVR's brief, "[t]he transfers were essential to what the Bankruptcy Court characterized as 'a textbook example of how a Chapter 11 (bankruptcy) should work.'"[24]

During its reorganization, NVR made 5571 transfers of real property and paid to the state and local taxing authorities $8,349,103 in transfer and recordation taxes.[25] Of that sum, slightly fewer than $7,000,000 went to taxing authorities in Maryland and Pennsylvania.[26] Section 4.13 of the Bankruptcy Plan approved by the bankruptcy court exempted NVR from the transfer and recordation taxes and reads as follows:

> Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer, or exchange of securities pursuant to the Plan, and the transfer of, or creation of any lien on, any property of any Debtor under, in furtherance of, or in connection with the Plan shall not be subject to any stamp tax, real estate transfer tax, recordation tax, or similar tax.[27]

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19. *See id.*
20. *See id.*
21. *See id.* at 447-48.
22. Brief for Appellee at 18, *In re* NVR, LP, 189 F.3d 442 (4th Cir. 1999) (No. 98-2211).
23. *See id.*
24. *Id.* (citation omitted).
25. *See In re NVR*, 189 F.3d at 448.
26. *See id.*
27. *Id.*

The court found that this section of the plan mirrored section 1146(c) of the Bankruptcy Code,[28] which entitles certain bankruptcy debtors to this type of relief. After NVR emerged from bankruptcy, it began to pursue refunds of the recordation and transfer taxes paid by it during the entire bankruptcy period.[29]

Without protest, the states of Delaware, New York, North Carolina, and Virginia refunded the taxes.[30] Maryland and Pennsylvania, on the other hand, refused to refund the requested taxes.[31] NVR filed a Rule 9014 motion under the Federal Rules of Bankruptcy Procedure[32] to obtain an interpretation of whether the payments made to the taxing authorities in Maryland and Pennsylvania were exempted under the Bankruptcy Code and the reorganization plan.[33] Both the state and local taxing authorities argued that the plan and the Code provision did not operate throughout the bankruptcy period and only exempted NVR for taxes paid on transfers that occurred after the reorganization plan was confirmed and until NVR emerged from bankruptcy.[34] The state taxing authorities further argued that the Eleventh Amendment exempted them from any ruling of the federal courts.[35]

The bankruptcy court held that NVR was entitled to a refund of the taxes paid during the entire bankruptcy period but held that the states were not bound by its determination because of their Eleventh Amendment sovereign immunity.[36] The district court affirmed the bankruptcy court's determination that NVR was entitled to a refund of all the taxes paid during the bankruptcy period, but reversed the bankruptcy court's finding of Eleventh Amendment sovereign immunity.[37] The district court based its holding on the conclusion that the Rule 9014 proceeding was not a "suit" covered by the Eleventh

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28. 11 U.S.C. § 1146(c) (Supp. 1999) provides that "[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed . . . , may not be taxed under any law imposing a stamp tax or similar tax." *Id.*

29. *See In re NVR*, 189 F.3d at 448.

30. *See id.*

31. *See id.*

32. *See* 11 U.S.C. § 9014 (Supp. 1999); *see also supra* note 8.

33. *See In re NVR*, 189 F.3d at 448.

34. *See* Brief for Appellants at 11, *In re* NVR, LP, 189 F.3d 442 (4th Cir. 1999) (No. 98-2211).

35. *See id.* at 30.

36. *See In re NVR*, 189 F.3d at 448.

37. *See id.*

Amendment.[38] The taxing authorities appealed to the Fourth Circuit.[39]

2. *Legal Background.*—

a. The History of State Sovereign Immunity.—State sovereign immunity is derived from the English common law theory that the king "can do no wrong" and thus could not be sued in his own courts.[40] The Constitution makes no mention of sovereign immunity, nevertheless the Supreme Court found that it was implicit in the United States government and was adopted with the reception of the common law from England.[41]

The first Supreme Court decision on state sovereign immunity, *Chisholm v. Georgia*,[42] adopted a literal interpretation of Article III.[43] In *Chisholm*, the Court allowed a citizen of South Carolina to sue the state of Georgia in federal court based on diversity of citizenship.[44] The holding that citizens of the United States could sue a state in federal court "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted."[45] In an effort to reverse both the holding in *Chisholm* and the case's foundation in the Constitution, state sovereignty advocates drafted the Eleventh Amendment to mirror and reverse the language used in Article III.[46] The Eleventh Amendment provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity,

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38. *See* Clerk of the Circuit Court for Anne Arundel County, Maryland v. NVR Homes, Inc., 222 B.R. 514, 520 (E.D. Va. 1998) (holding that the proceeding lacked the fundamental attributes that commonly identify a "suit").

39. *See id.*

40. *See* United States v. Nordic Village, Inc., 503 U.S. 30, 42 (1992) (quoting 1 W. BLACKSTONE COMMENTARIES 246 (1765)).

41. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 69 (1996) (recognizing that sovereign immunity existed before the Constitution and was implicit in the federal framework). The notion that sovereign immunity was implicit in the government is perhaps in conflict with the actual text of Article III. Article III provides that "[t]he judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to Controversies . . . between a State and Citizens of another state . . . ." U.S. CONST. art. III, § 2, cl. 1.

42. 2 U.S. (2 Dall.) 419 (1793).

43. *See id.* at 465 (stating that "[t]his Doctrine (allowing a citizen of South Carolina to sue the state of Georgia) rests not upon the legitimate result of a fair and conclusive deduction from the Constitution: it is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself").

44. *Id.* at 478.

45. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97 (1984) (internal quotation marks omitted) (quoting Monaco v. Mississippi, 292 U.S. 313, 325 (1934)).

46. *See* Gordon G. Young, Comment, *Seminole Tribe v. Florida*, 56 MD. L. REV. 1411, 1423 (1997) (suggesting that the language of the Eleventh Amendment "closely tracks" the language of Article III).

commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[47] Although the language of the amendment might be read to make the states immune from suits in federal court based on diversity only, the Court expanded the Amendment's coverage to include suits based on federal questions in *Hans v. Louisiana*.[48]

After its decision in *Hans*, the Court held that Congress could abrogate state sovereign immunity only when its intention is "unmistakably clear in the language of the statute,"[49] and when acting under a valid exercise of its power to abrogate.[50] Before 1996, the Court recognized two situations where Congress could abrogate state sovereign immunity. First, in *Fitzpatrick v. Bitzer*[51] the Court allowed abrogation where Congress acted pursuant to its enforcement powers under the Fourteenth Amendment.[52] According to one commentator, "*Fitzpatrick* suggests that the powerful policies of the Fourteenth Amendment repeal any earlier constitutional immunities posing a threat to realization of the aims of this Reconstruction Amendment."[53] In *Fitzpatrick* Justice Rehnquist noted "that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[54]

Second, in *Pennsylvania v. Union Gas*,[55] the Court permitted abrogation when Congress acted under its Article I Commerce Clause Powers.[56] In this 5-4 decision, the Court held that:

> [b]ecause the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in

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47. U.S. CONST. amend. XI.

48. 134 U.S. 1, 20-21 (1890) (holding that sovereign immunity extended to suits against a state brought by its own citizens).

49. Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 104 (1989) (plurality opinion).

50. *See* Green v. Mansour, 474 U.S. 64, 68 (1985) (noting that because of the Eleventh Amendment, states may not be sued in federal court unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate).

51. 427 U.S. 445 (1976).

52. *See id.* at 456 (holding that Congress may provide for suits against the states if the suits are appropriate to enforce the provisions of the Fourteenth Amendment).

53. Young, *supra* note 46, at 1414.

54. *Fitzpatrick*, 427 U.S. at 456.

55. 491 U.S. 1 (1989) (plurality opinion).

56. *See id.* at 23.

> damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.[57]

The Court went on to find that the states consented to all suits arising under the Commerce Clause when they ratified the Constitution.[58] In *Union Gas*, the Court found that the power given to Congress in Article I would be meaningless without the ability to have those powers enforced in the judiciary.[59] The Court concluded that as long as Congress was acting validly under its Article I powers, they could abrogate state sovereign immunity.[60] This holding was well received by legal scholars who had long held that this view was necessary for effective and equitable judicial resolutions in environmental, bankruptcy, intellectual property, and maritime law cases.[61]

The *Ex parte Young* Doctrine embodies the only other circumstance where the Court permits a limitation on state sovereign immunity.[62] The *Young* Doctrine permits suits by citizens to enjoin state officials from violating federal law.[63] The *Young* Doctrine rests on a legal fiction that places suits against state officials "outside the definition of suits against states" and thus outside the ambit of sovereign immunity.[64] The *Young* Doctrine is based on the notion that private parties enjoy "economic substantive due process" rights,[65] and that when a state is depriving a private party of this right, the private party can maintain an injunction to prevent the prospective harm from continuing.[66]

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57. *Id.* at 19-20.

58. *Id.* at 20 ("The States held liable under such a congressional enactment are thus not 'unconsenting'; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.").

59. *Id.* at 19-20.

60. *Id.* at 19.

61. *See* Young, *supra* note 46, at 1415 n.28 (noting that in the decade preceding *Union Gas* many distinguished academics endorsed the broad position that state immunity had no application to suits brought to enforce federal law (citing Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 549 (1977); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983))).

62. Young, *supra* note 46, at 1415.

63. *Ex parte* Young, 209 U.S. 123, 167-68 (1908).

64. Young, *supra* note 46, at 1416, 1416 n.33 (citing PETER W. LOW & JOHN CALVIN JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 887 (3d ed. 1994)).

65. Patricia L. Barsalou & Scott A. Stengel, Ex Parte Young: *Relativity in Practice*, 72 AM. BANKR. L.J. 455, 479 (1998).

66. *See* Edelman v. Jordan, 415 U.S. 651, 665 (1974) (distinguishing permissible *Ex parte Young* actions for an injunction from impermissible suits for retrospective damages).

In a major shift in its jurisprudence on sovereign immunity, the Court in *Seminole Tribe v. Florida* overruled *Union Gas*,[67] and cast doubt on the broad application of *Ex parte Young*.[68] In *Seminole Tribe*, an Indian Tribe sued the State of Florida and the Governor of Florida for failing to negotiate in good faith under the Federal Indian Gaming Act.[69] Congress passed this Act pursuant to the Indian Commerce Clause in Article I.[70] The Court stated:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.[71]

In overruling *Union Gas*, the Court noted that the Seminole Tribe only stipulated that the statute was valid under Congress's power to regulate under the Indian Commerce Clause, not the Fourteenth Amendment or the Interstate Commerce Clause.[72] Thus, the case only dealt with abrogation under Congress's Indian Commerce Clause

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67. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72 (1996) (stating that "[i]n overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government").

68. *See* Young, *supra* note 46, at 1416-17 (noting that "the implausible lengths to which the majority went in finding congressional intent to forbid injunctive enforcement suggest that the Court might be moving toward allowing *Ex parte Young* suits to enforce federal statutes only to the extent that the statutes expressly provide for such enforcement").

69. *Seminole Tribe*, 517 U.S. at 51-52.

70. *See id.* at 47.

71. *Id.* at 72-73.

72. *Id.* at 60. The Court stated that

> petitioner does not challenge the Eleventh Circuit's conclusion that the Act was passed pursuant to neither the Fourteenth Amendment nor the Interstate Commerce Clause. Instead, accepting the lower court's conclusion that the Act was passed pursuant to Congress' power under the Indian Commerce Clause, petitioner now asks us to consider whether that Clause grants Congress the power to abrogate the States' sovereign immunity.

Id. at 60.

powers.[73] Because the parties did not argue that the statute was a valid exercise of Congress's power under section 5 of the Fourteenth Amendment, the Court did not consider this avenue.[74] Because the Court did not address this issue, the Fourteenth Amendment power to abrogate in this situation remains unresolved.[75]

The Court also cast doubt on *Ex parte Young* when it denied an injunctive suit against the Florida governor.[76] The Court held that an *Ex parte Young* suit was inappropriate because Congress already outlined the manner in which the Indian Gaming Act would be enforced.[77] The Court held that Congress intended to impose certain sanctions for violations of the Act, sanctions more limited than the injunctive relief that courts would impose in an *Ex parte Young* suit.[78] Because the court found *Ex parte Young* inapplicable, injunctive relief was inappropriate under the Act, and the Seminole Tribe was left

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73. *See id.*

74. *See id.*

75. The Court, however, has recently decided two cases where the parties alleged that state sovereign immunity was abrogated by Congress acting under its powers to enforce the Fourteenth Amendment. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), the Court found that Congress had expressly intended that the states be subject to suit under certain patent infringement claims, and that Congress had enacted the legislation under section 5 of the Fourteenth Amendment. *Id.* at 635-36. However, the Court found that although the patent right was a property right, there was neither sufficient evidence to show that the states were systematically and intentionally depriving parties of this right nor were the state remedies safeguarding this right inadequate to protect this right. *Id.* at 642-46. As such, the Court found that the remedial legislation under section 5 of the Fourteenth Amendment was neither a necessary nor appropriate way to enforce the Fourteenth Amendment and the abrogation provision failed. *Id.* at 645-48. Similarly, the provisions of the Age Discrimination in Employment Act of 1967 attempting to abrogate state sovereign immunity were found to be outside the scope of Congress's remedial powers under section 5 of the Fourteenth Amendment in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). The Court again found a lack of evidence that Congress was acting to remedy a significant pattern of unconstitutional discrimination. *Id.* at 89. Thus, the Court held that "Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Id.* at 91. These cases make clear that the Court will require extensive evidence that the states are engaging in a pattern of violations involving the life, liberty, or property rights of its citizens and that inadequate state remedies exist to protect these rights before it will find valid federal legislation abrogating state sovereign immunity.

76. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 73 (1996). The Court concluded that "[t]he situation presented here . . . is sufficiently different from that giving rise to the traditional *Ex Parte Young* action so as to preclude the availability of that doctrine." *Id.*

77. *Id.* at 74 (stating that "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary").

78. *Id.* at 74-75.

without an apparent remedy because they had failed to state a claim upon which relief could be granted.[79]

b. Fourth Circuit Jurisprudence under Seminole Tribe.—In the bankruptcy case of *Schlossberg v. Maryland*,[80] the Fourth Circuit Court of Appeals applied the precedent set out in *Seminole Tribe*.[81] In *Schlossberg*, the trustee of a bankrupt estate filed an adversary proceeding against the State of Maryland's Comptroller of the Treasury to avoid as a preference the bankruptcy debtor's payment of income taxes made to the state within ninety days of its filing for bankruptcy.[82] The court found that in section 106 of the Bankruptcy Code Congress expressly intended to abrogate state sovereign immunity,[83] but found that Congress lacked the authority under the Bankruptcy Clause to do so.[84] The court concluded that "in light of *Seminole*. . . Congress is not empowered to use Article I authority, specifically the Bankruptcy Clause, to circumvent the Eleventh Amendment's restriction on federal jurisdiction."[85]

The court discussed the possibility that section 106 could be a valid abrogation of Eleventh Amendment State Sovereign Immunity under section 5 of the Fourteenth Amendment.[86] The court found, however, "no evidence that Congress either passed [section 106 of] the Bankruptcy Code under § 5 of the Fourteenth Amendment or sought to preserve the core values specifically enumerated in that amendment."[87] The court concluded that Congress acted under the same Article I powers in writing section 106 as it did in writing the entire bankruptcy code,[88] and declined to "presume that Congress in-

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79. *See* Young, *supra* note 46, at 1435 (commenting that as a result of the Court's conclusion that Congress did not intend to impose injunctive sanctions against state officers, "the Tribe lost for the simplest of reasons—failure to state a claim upon which relief can be granted").

80. 119 F.3d 1140 (4th Cir. 1997).

81. *Id.* at 1145.

82. *Id.* at 1142.

83. *Id.* at 1144-45.

84. *See id.* at 1147 ("Because there is no evidence that Congress either passed the Bankruptcy Code under § 5 of the Fourteenth Amendment or sought to preserve the core values specifically enumerated in that amendment, we hold that Congress' effort to abrogate the states' Eleventh Amendment immunity through its 1994 enactment of 11 U.S.C. § 106(a) is unconstitutional and ineffective.").

85. *Id.*

86. *Id.* at 1146.

87. *Id.* at 1147.

88. *Id.* at 1146 ("Indeed, the conclusion seems logically inescapable that in passing the 1994 Act Congress exercised the same specifically enumerated Article I bankruptcy power that it has traditionally relied on in enacting prior incarnations of the bankruptcy law dating back to 1800—68 years before the passage of the Fourteenth Amendment.").

tended to enact a law under a general Fourteenth Amendment power to remedy an unspecified violation of rights when a specific, substantive Article I power clearly enabled the law."[89] The court found the state immune from the trustee's adversary proceeding and ordered the action dismissed.[90]

The Fourth Circuit later fortified federal court jurisdiction over states in *State of Maryland v. Antonelli Creditors Liquidating Trust.*[91] In *Antonelli*, the State contested the validity of a confirmed bankruptcy court order holding that section 1146(c) allowed the debtor and its assignees an exemption from certain transfer and recording taxes.[92] The State claimed that the Eleventh Amendment made it immune from the court order exempting these taxes and sought recovery of the exempted taxes.[93] The court held that the bankruptcy court had jurisdiction over the entire bankruptcy estate and that this jurisdiction extended to any claims that a State or any other creditor may have in the estate.[94] Thus, if a State wants to contest the validity of a bankruptcy exception then it must enter the court and contest the bankruptcy court order when it receives notice of the bankruptcy plan prior to its confirmation.[95] In the court's own words, "[w]hile forcing a state to make such a choice may not be ideal from the state's perspective, it does not amount to the exercise of federal judicial power to hale a state into federal court against its will and in violation of the Eleventh Amendment."[96] The court's holding in *Antonelli* advocates that debtors with federal rights deriving from the bankruptcy process should withhold all State taxes or payments that they believe exempted. Then, if the States wishes to pursue the taxes, the State must waive its sovereign immunity and submit to federal court jurisdiction to prove its claims against the debtor.[97]

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89. *Id.*

90. *Id.* at 1150.

91. 123 F.3d 777 (4th Cir. 1997).

92. *Id.* at 779.

93. *See id.*

94. *Id.* at 786-87. The court explained that "the power of the bankruptcy court to enter an order confirming a plan, including a provision interpreting § 1146(c), derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates." *Id.* at 787 (citing Spartan Mills v. Bank of Am., 112 F.3d 1251, 1255 (4th Cir. 1997)). After clarifying the bankruptcy court's jurisdiction, the court concluded that "neither the party status nor the immunity of state and local governments has any impact on the bankruptcy court's power to determine whether the terms of a reorganization plan comply with federal law." *Id.*

95. *See id.* ("It is true that if a state wishes to challenge a bankruptcy court order of which it receives notice, it will have to submit to federal jurisdiction.").

96. *Id.*

97. *See id.*

In *CSX Transportation, Inc. v. Board of Public Works of the State of West Virginia*,[98] the Fourth Circuit dealt with the continued viability of *Ex parte Young* in cases in which private parties sue the states and the states claim sovereign immunity.[99] A railroad line, CSX, sued West Virginia in federal court alleging that the state levied and collected ad valorem taxes in violation of a federal act.[100] West Virginia claimed Eleventh Amendment immunity from the suit.[101] The court held that CSX could obtain relief against the state under the *Ex parte Young* doctrine.[102] The court noted that because the Railroad only paid half of the non-contested taxes assessed against it, it could seek prospective relief in the form of an injunction ordering that it pay only a percentage of the other half of the non-contested taxes owed, deducting the amount for the ad valorem taxes that were allegedly assessed in error.[103] Finding that an *Ex parte Young* injunction could provide CSX with relief, the court reversed the district court's order dismissing the suit for lack of jurisdiction and remanded the case to the district court to determine the merits of the allegedly illegal taxes assessed.[104]

Finally, in *Virginia v. Collins* (*In re Collins*)[105] the Fourth Circuit applied *Antonelli* and held the Commonwealth of Virginia subject to a bankruptcy court's ruling on the dischargeability of a debt owed to the Commonwealth.[106] In *Collins*, the Commonwealth sought to collect on a debt that the bankruptcy court had discharged four years earlier.[107] The debtor filed a motion to re-open the bankruptcy case for a determination on the discharge of the debt.[108] The Commonwealth then claimed Eleventh Amendment sovereign immunity from the determination of the court.[109] The court concluded that jurisdiction on this matter derived from jurisdiction over the debtor's estate

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98. 138 F.3d 537 (4th Cir. 1998).

99. *See id.* at 538.

100. *See id.* at 538-39. CSX sued West Virginia for allegedly violating section 306(1)(a) of the 4-R Act, and 49 U.S.C. § 11501(b)(1) & (c). *See id.* at 539.

101. *See id.*

102. *Id.* at 540.

103. *Id.* at 543.

104. *Id.* This case affirms the continued validity of *Ex parte Young* injunctions after *Seminole Tribe* and shows the court's willingness to apply injunctions in creative ways to circumvent state claims of sovereign immunity. *See id.* (holding that CSX only paid a percentage of the half of the taxes owed).

105. 173 F.3d 924 (4th Cir. 1999).

106. *Id.* at 928-31.

107. *Id.* at 926.

108. *See id.*

109. *See id.*

and not from jurisdiction over the state and other creditors.[110] The court also noted that a motion to reopen the case was not a suit.[111] In *Collins*, the court pointed out that the motion to reopen did not amount to a suit because "The Commonwealth, however, was not named as a defendant, was not served with process, and was not compelled to appear in bankruptcy court."[112] The court acknowledged the "tough spot" in which this finding placed the Commonwealth.[113] The Commonwealth had to either waive its sovereign immunity by entering the bankruptcy proceeding and making its claim on the merits of discharge in the original bankruptcy case, or stay out of court and be forced to abide by the federal court's order.[114] The Commonwealth was free to respond to the motion or ignore it.[115] The court held that the state could not claim immunity from the decision of the court and discharged the debt owed to the Commonwealth.[116]

c. History of What Constitutes a Suit for Eleventh Amendment Purposes.—The United States Supreme Court first discussed what constitutes a "suit" for Eleventh Amendment purposes in *Cohens v. Virginia*.[117] Justice Marshall, writing for the Court, commented: "[w]hat is a suit? We understand it to be prosecution or pursuit of some claim, demand or request."[118] In *Cohens*, Chief Justice Marshall pointed out that there are some legal actions that are not suits under the Eleventh Amendment.[119] The *Cohens* Court enumerated six factors that are used in determining whether an action constitutes a "suit."[120] These factors are: (1) the existence of an adversarial proceeding; (2) which consists of at least two parties; (3) which emanates

110. *Id.* at 931. The court determined that "the bankruptcy court did not need to assert jurisdiction over the Commonwealth to determine the dischargeability of the bail bond debt in conjunction with its decision to reopen." *Id.* (citing Texas v. Walker, 142 F.3d 813, 822 (5th Cir. 1998)). Rather, the court concluded that the bankruptcy court "had the power to do that because it had jurisdiction over the debtors and their case." *Id.*

111. *Id.* at 929 (stating that "[i]n these circumstances, the motion to reopen was not a suit 'against one of the United States' within the meaning of the Eleventh Amendment" (quoting Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997))).

112. *Id.* at 929.

113. *Id.* at 931.

114. *See id.* (commenting, "[i]t could decline to appear and thereby forego the opportunity to make its argument and challenge any decision" but "[o]n the other hand, it could voluntarily submit to federal jurisdiction and take part in the proceedings").

115. *See id.* at 929.

116. *Id.* at 926.

117. 19 U.S. 264 (1821).

118. *Id.* at 405.

119. *See id.* at 407.

120. *Id.* at 407-09.

from the deprivation of property or injury; (4) which compels the attendance of the parties; (5) which asserts and prosecutes a claim against one party; and (6) where one party demands the restoration of some thing from the defending party.[121]

More recently in *Gardner v. State of New Jersey*[122] the Supreme Court held that a bankruptcy court "had jurisdiction over the proof and allowance of the tax claims and that the exercise of that power was not a suit against a State."[123] The Court held that the bankruptcy court had the power to adjudicate all of the interests in the *res* of the debtor, and that the state's tax claims did not elevate the proceeding to a "suit."[124]

The Court made a similar distinction between suits and the disposition of estates in *Ford Motor Co. v. Department of Treasury of Indiana.*[125] The Court stated that "[w]e have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding."[126] The Court in *Ford Motor Co.* held that because the action was "in essence one for the recovery of money from the state," it constituted a suit against the state.[127] The Court has held that some legal actions against the states are suits that allow a state to invoke the defense of sovereign immunity while others are not, thus barring the use of sovereign immunity. These decisions demonstrate that the nature of the action must be scrutinized in each case to determine whether it amounts to a "suit."

d. The History of what Constitutes a Transfer made "Under a Plan Confirmed" in Section 1146(c).—Section 1146(c) of Title 11,[128] "Special Tax Provisions," details the protections that bankruptcy may afford a debtor in reorganization. Section 1146(c) states, "[t]he issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp or similar tax."[129] Courts have construed this provision to exempt those taxes imposed at the time of transfer or sale of the item at issue where the

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121. *See In re* Barrett Refining Corp., 221 B.R. 795, 803 (Bankr. W.D. Okla. 1998) (citing *Cohens*, 19 U.S. at 407-12).

122. 329 U.S. 565 (1947).

123. *Id.* at 572.

124. *Id.* at 573-74.

125. 323 U.S. 459 (1945).

126. *Id.* at 464 (citing *Ex parte* Ayers, 123 U.S. 443, 490-99 (1887); *Ex parte* New York, 256 U.S. 490, 500 (1920); Worcester County Trust Co. v. Riley, 302 U.S. 292, 296-98 (1937)).

127. *Id.*

128. 11 U.S.C. § 1146(c) (Supp. 1999).

129. *Id.*

amount due is typically "determined by consideration for, par value of, or value of the item being transferred."[130] The provision also applies to mortgage recording taxes[131] and real property transfer taxes.[132]

The Second Circuit Court of Appeals in *In re Jacoby-Bender Inc.*[133] interpreted the phrase "under a plan confirmed" in section 1146(c) to mean necessarily contemplated by the confirmed bankruptcy plan.[134] The court held that the sale of a building was under a plan confirmed even though the plan did not specifically mention the transfer, reasoning that "where, as here, a transfer, and hence an instrument of transfer, is necessary to the consummation of a plan, the plan seems implicitly to have 'dealt with' the transfer instrument."[135] The federal district courts in New York have used the *Jacoby-Bender* holding to support their findings that the transfers essential to the confirmation of the bankruptcy plan were "under a plan confirmed."[136] In *In re Smoss Enterprises Corp.*,[137] the district court held that the sale of a building under a pre-petition contract was "under a plan" confirmed and thus exempt from stamp and recording taxes.[138] The court held that the transfer was exempt because it was essential to the confirmation of the bankruptcy plan and because the bankruptcy court contemplated the transfer before confirming the plan.[139]

e. Section 106(b) and the Fourteenth Amendment.—In *CSX*, the Fourth Circuit discussed the possibility that the legislation abrogating sovereign immunity may find support in the Fourteenth Amendment and be held constitutional even if the legislation does not mention

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130. 995 Fifth Ave. Assocs. v. New York State Dep't of Taxation and Fin. (*In re* 995 Fifth Ave. Assocs.), L.P., 963 F.2d 503, 512 (2d Cir. 1992).

131. *See* City of New York v. Baldwin League of Indep. Schs. (*In re* Baldwin League of Indep. Schs.), 110 B.R. 125, 126 (S.D.N.Y. 1990).

132. *See* Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 784-86 (4th Cir. 1997).

133. 758 F.2d 840 (2d Cir. 1985).

134. *See id.* at 842.

135. *Id.*

136. *See infra* notes 137-139 and accompanying text.

137. 54 B.R. 950 (E.D.N.Y. 1985).

138. *Id.* at 951.

139. *Id.* The court concluded that "[t]he language of § 1146(c) exempting a transfer by the Bankruptcy Court was surely designed to reach the one transfer on which the plan hinged and which the court had to approve prior to the confirmation." *Id.*; *see also In re* Permar Provisions, Inc., 79 B.R. 530, (E.D.N.Y. 1987) (holding that where the plan probably could not have been confirmed but for the post confirmation, pre-petition sale of debtor's assets, the sale was exempt from the taxes under section 1146(c)).

the Fourteenth Amendment.[140] The court noted "Congress's failure to mention that it acted pursuant to Section Five of the Fourteenth Amendment is not dispositive."[141] In *Schlossberg*, however, the court concluded that there was no evidence that Congress enacted section 106(b) under its Fourteenth Amendment powers or that the statute deals with the "core values" of that Amendment.[142]

Other courts considering this issue have held that section 106 was enacted pursuant to the Fourteenth Amendment.[143] In *In re Straight*,[144] the district court in Wyoming adopted the pre-*Seminole* reasoning from *In re Southern Star Foods*.[145] The *Southern Star Foods* court held that the Bankruptcy Code bestows all citizens with rights and privileges that come from Congress's Article I powers; however the power to enforce these rights and privileges stem from Congress's power under section five of the Fourteenth Amendment.[146]

A bankruptcy court in the Eleventh Circuit in *In re Headrick*[147] also held section 106 valid under the Fourteenth Amendment, stating that "Article I empowers Congress to grant debtors the privileges and immunities of the Bankruptcy Code, and the Fourteenth Amendment gives Congress the right to enforce those privileges and immunities by creating private rights of action against the States."[148]

On appeal, both the Tenth[149] and Eleventh Circuits[150] declined to consider the Fourteenth Amendment issue and affirmed the lower court's decision based on the State's waiver of sovereign immunity.

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140. *See* CSX v. Board of Pub. Works, 138 F.3d 537, 540 (4th Cir. 1998) (noting that "the wealth of precedent establishing that Congress's failure to mention that it acted pursuant to Section Five of the Fourteenth Amendment is not dispositive"); *see also supra* notes 101-104 and accompanying text (discussing the Fourth Circuit's holding in *CSX*).

141. *CSX*, 138 F.3d at 540.

142. Schlossberg v. Maryland (*In re* Creative Goldsmiths of Washington, D.C.), 119 F.3d 1140, 1147 (4th Cir. 1997) (holding that because there is no evidence that Congress passed the Bankruptcy Code under the Fourteenth Amendment that Congress's effort to abrogate the states' Eleventh Amendment immunity through its enactment of 11 U.S.C. § 106(a) is unconstitutional and ineffective).

143. *See* Wyoming Dep't of Transp. v. Straight (*In re* Straight), 209 B.R. 540, 555 (D. Wyo. 1997) (concluding that Congress has the authority under the Fourteenth Amendment to abrogate states' sovereign immunity from suits brought under the Bankruptcy Code); Headrick v. Georgia (*In re* Headrick), 200 B.R. 963, 967 (Bankr. S.D. Ga. 1996) (same); Mather v. Oklahoma Employment Sec. Comm'n (*In re* Southern Star Foods, Inc.), 190 B.R. 419, 426 (Bankr. E.D. Okla. 1995) (same).

144. 209 B.R. 540 (D. Wyo. 1997).

145. *See id.* at 555.

146. *See In re Southern Star Foods*, 190 B.R. at 426.

147. 200 B.R. 963 (Bankr. S.D. Ga. 1996).

148. *Id.* at 967.

149. Wyoming v. Department of Transp. (*In re* Straight), 143 F.3d 1387 (10th Cir. 1998).

150. *In re* Headrick, 146 F.3d 1313 (11th Cir. 1998).

3. The Court's Reasoning.—In *NVR*, the court faced two principal issues; whether the Eleventh Amendment bars the debtor's action seeking a refund of exempt transfer and recording taxes and whether section 1146(c) exempts debtors in reorganization from paying transfer and recordation taxes paid after the bankruptcy petition but before the confirmation of the reorganization plan.[151] Justice Williams, writing for the court, addressed the Eleventh Amendment aspect first, as that issue dictated the outcome of the case.[152]

The court began its decision with an extensive account of the Supreme Court's Eleventh Amendment jurisprudence and the recent Fourth Circuit cases discussed above.[153] The court then attempted to apply the discussed precedent to the present case. The court noted that in *Schlossberg v. Maryland* the Fourth Circuit applied the *Seminole Tribe* analysis and held that the express abrogation of state sovereign immunity embodied in section 106 of the bankruptcy code was unconstitutional.[154] The court reaffirmed its finding that this section of the bankruptcy code had been enacted pursuant to Congress's powers under the Bankruptcy Clause[155] and not under its authority to enforce the dictates of the Fourteenth Amendment.[156]

The court then sought to clarify the correct classification of NVR's section 9014 motion which sought a declaration that NVR was exempt from the transfer and recording taxes.[157] The court stated that the inquiry turned on whether the motion was "the prosecution of some demand in a court of justice" or "the orderly disposition of an estate."[158] This issue controls the case because if the court found that this action was a suit against the states, then *Schlossberg* would require a holding that it was impermissible under the Eleventh Amendment.[159] The court noted that if the motion was found merely to be a proceeding to clarify the Chapter 11 plan of reorganization, then the *Antonelli*

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151. *In re NVR*, 189 F.3d at 448.

152. *Id.* at 454.

153. *Id.* at 448-52. The court first traced state sovereign immunity from its common law origins through the Supreme Court's decision of *Seminole Tribe*. It then commented on the Fourth Circuit's post-*Seminole* jurisprudence.

154. *Id.* at 450.

155. *See* U.S. CONST. art. I, § 8, cl. 4. The clause states that Congress shall have the power "to establish . . . Uniform Laws on the subject of Bankruptcies . . . ." *Id.*

156. *In re NVR*, 189 F.3d at 450.

157. *Id.* at 451-54.

158. *Id.* at 452 (internal quotation marks omitted) (quoting Cohens v. Virginia, 19 U.S. 264, 407 (1821)).

159. *See id.* at 450-51 (noting that in *Schlossberg*, the court found that an adversary proceeding seeking a return of property from the State violated the Eleventh Amendment and was impermissible).

precedent would control, and this action would not offend state sovereign immunity because the court's jurisdiction would derive from its jurisdiction over the debtor's estate.[160]

The court, relying upon Justice Marshall's opinion in *Cohens v. Virginia*,[161] noted that there are three categories or "prongs" of "crucial characteristics" that bear on the court's decision to either hold this motion an impermissible suit against the states or a permissible proceeding over an estate.[162] According to the court, these crucial characteristics include "the coercion exercised against the states, whether the resolution required federal jurisdiction over the states, and the substance of the remedy sought. . . ."[163]

The court first addressed prong one, the coercive nature of the section 9014 motion.[164] According to the court, this motion, entitled "Contested Matters," was not treated as an administrative matter because it was adversarial and involved at least "two parties who are opposing each other with respect to relief sought by one of them."[165] The court noted, however, that Maryland and Pennsylvania did not receive a summons but were merely served with notice of the proceeding.[166] Furthermore, the court noted that the bankruptcy court in this proceeding exercised no greater coercion over the two states than the coercion exercised by the bankruptcy court in proceedings to determine the disposition of the debtor's estate.[167] Thus, the precedent set out in *Antonelli* and *Collins* bound the court to conclude that the coercion exercised on the two states was insufficient by itself to find this matter an impermissible suit.[168] The court pointed out that proceedings of this nature put the states in an awkward position and that "this position was not an enviable one for the states because they either had to enter federal court to defend their rights or to allow the court to proceed without the benefit of their arguments."[169] The court concluded that irrespective of the unenviable position of the

160. *In re NVR*, 189 F.3d at 451; *see, e.g.*, Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997) (noting that the power of a bankruptcy court to enter an order confirming a plan derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates).

161. 19 U.S. (6 Wheat.) 264 (1821).

162. *In re NVR*, 189 F.3d at 452.

163. *Id.*

164. *Id.* at 452-53.

165. *Id.* at 452 (internal quotation marks omitted) (quoting 10 COLLIER ON BANKRUPTCY § 9014.01 (Lawrence P. King ed., 15th ed. 1999)).

166. *Id.*

167. *Id.* at 452-53.

168. *Id.* at 453.

169. *Id.* (citing *In re* Collins, 173 F.3d 924, 931 (4th Cir. 1999)).

states, under prong one, the court's jurisdiction over this type of matter was not a violation of the Eleventh Amendment.[170]

The court then discussed prong two of its test—whether the resolution required jurisdiction over the states.[171] The court discussed the States' argument that the ultimate resolution of the matter required jurisdiction over the states even if the procedural posture of the motion might not require jurisdiction.[172] Furthermore, the court noted that to grant relief in this matter it would have to order the states to return the tax payments.[173] If the court could not make such an order, then any court order would be "advisory and improper."[174] Thus, the court concluded that to be able to grant the requested remedy—the refund of the tax payments—the court needed jurisdiction over the states.[175] The court concluded that "[t]his finding alone is enough to determine that the action, if it is to meet the requirements of Article III, is a suit against the states."[176]

The court then addressed the third prong of the test—the substance of NVR's demand for relief.[177] The court noted that NVR demanded payment from the Maryland and Pennsylvania treasuries, and that "[a]lthough federal *law* may reign supreme in the bankruptcy context, the federal *courts* do not necessarily reign supreme over an unconsenting state's treasury."[178] The court focused its rationale on the fact that while they had complete jurisdiction over the debtor's estate, they lacked jurisdiction over the states' treasuries.[179] The court concluded that "a state is closely identified with its treasury and an action leading to an order forcing a payment to citizens is the quintessential 'suit' under the Eleventh Amendment."[180]

The court concluded that although NVR had not summoned the states into court, the fact that a determination favorable to NVR would

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170. *Id.* (stating that "it does not amount to the exercise of federal judicial power to hale a state into federal court against its will, and in violation of the Eleventh Amendment" (internal quotation marks omitted) (quoting Maryland v. Antonelli, 123 F.3d 777, 787 (4th Cir. 1997))).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* (citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48-49 (1994); Ford Motor Co. v. Department of Transp. of Ind., 323 U.S. 459, 464 (1945); Gray v. Laws, 51 F.3d 426, 433 (4th Cir. 1995)).

require the court to "raid Maryland's and Pennsylvania's treasuries" dictated that this proceeding was indeed a suit against the states from which the States could rightfully claim state sovereign immunity.[181] In exercising judicial restraint, the court stated that its "constitutional power to enforce federal bankruptcy law, absent a waiver of immunity, does not allow for the forced extraction of payments from a sovereign state's treasury."[182]

The court noted that this holding only resolves the portion of the proceeding between NVR and the States of Maryland and Pennsylvania, and not those proceedings brought against local government because local taxing authorities do not enjoy sovereign immunity.[183] The court then turned its attention to the correct interpretation of "under a plan confirmed" in section 1146(c) as it was used in the NVR reorganization plan.[184] NVR argued, and the lower courts held, that section 1146(c) exempted NVR from transfer and recording taxes made throughout the bankruptcy period.[185] However, the local taxing authorities argued that the text of the section makes clear that the exemption only applies to transfers made after the confirmation of the reorganization plan.[186] The court set out to decide which transfers were "under a plan confirmed" and thus exempt from taxation under section 1146(c).

Both the bankruptcy court and the district court concluded that all the transfers made by the debtor during the bankruptcy period were "in furtherance of, or in connection with the Plan," as it was set out in section 4.13 of the plan.[187] The lower courts had reasoned that if the transfers were necessary to the confirmation of the plan, then they satisfied the "under a plan confirmed" requirement.[188] The court pointed out that this interpretation of section 1146(c) enjoys support from the lower courts of the Second Circuit.[189]

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181. *Id.* at 454.

182. *Id.*

183. *Id.* (citing Monell v. Department of Social Servs., 436 U.S. 658, 690 n.54 (1978); *Gray*, 51 F.3d at 431).

184. *Id.* at 454-55.

185. *See id.* at 454.

186. *See id.*

187. *Id.* at 455 (internal quotation marks omitted).

188. *Id.*

189. *Id.*; *see, e.g.*, City of New York v. Smoss Enters. Corp. (*In re* Smoss Enters. Corp.), 54 B.R. 950, 951 (E.D.N.Y. 1985) (holding a sale "under a plan" confirmed because "the transfer of the property was essential to the confirmation of the plan"); *see also supra* notes 133-139 and accompanying text (discussing the Second Circuit's approach to "under a plan confirmed").

The court began its analysis by observing that the Second Circuit alone had addressed this issue in *In re Jacoby-Bender*.[190] According to the *In re NVR* court, in *Jacoby-Bender*, the Court of Appeals for the Second Circuit found the transfers exempt because they were "necessary to the consummation of a plan."[191] The Fourth Circuit further mentioned that lower federal courts in the Second Circuit had mutated the term "consummation" to "confirmation."[192] The court rejected this adaptation and stated that making all transfers necessary to the confirmation of the plan was in "defeasance of § 1146(c)'s own terms."[193] The court reasoned that while some interpretation of the reorganization plan is needed to determine which transfers fall within the scope of the plan, section "1146(c) [itself] determines the ultimate extent of its operation."[194]

The court reasoned that because the bankruptcy court ultimately confirmed the plan, all of the transfers were "in furtherance of, or in connection with the Plan."[195] The court however, noted the restrictive terms of 1146(c) and held this language too expansive to survive judicial scrutiny.[196] The court held that the issue turned on the definition of the phrase "under a plan confirmed" in the text of 1146 (c).[197] The court, looking at the dictionary definitions of the term "under," concluded that "a transfer made prior to the date of plan confirmation could not be subordinate to, or authorized by, something that did not exist at the date of transfer—a plan confirmed by the court."[198] As such, the court concluded that only the post confirmation transfers were "under a plan confirmed" and exempted from the taxation by 1146(c).[199]

The court noted NVR's interpretation but rejected the proposition that "by mixing § 1146(c), the Plan, the bankruptcy court's order, and a dash of legislative history, private parties in partnership with federal courts can create new and improved tax exemptions for debt-

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190. *See In re NVR*, 189 F.3d at 455.

191. *Id.* (internal quotation marks omitted) (quoting City of New York v. Jacoby-Bender, Inc. (*In re* Jacoby-Bender, Inc.), 758 F.2d 840, 842 (2d Cir. 1985)).

192. *Id.* at 456 ("Lower courts, however, have extended the Second Circuit's language and altered *Jacoby-Bender*'s holding, changing the test from 'necessary to the consummation of a plan,' to 'necessary to the confirmation of a plan.'" (quoting City of New York v. Smoss Enters. Corp. (*In re* Smoss Enters. Corp.), 54 B.R. 950, 951 (E.D.N.Y. 1985))).

193. *Id.*

194. *Id.*

195. *Id.* at 457.

196. *See id.*

197. *See id.*

198. *Id.*

199. *Id.* at 458.

ors in reorganization proceedings."[200] The court stated that interpreting the plan in NVR's favor impermissibly expanded their judicial power over legislative enactments.[201] The court noted the legislative intent of 1146(c):

> Congress struck a most reasonable balance. If a debtor is able to develop a Chapter 11 reorganization and obtain confirmation, then the debtor is to be afforded relief from certain taxation to facilitate the implementation of the reorganization plan. Before a debtor reaches this point, however, the state and local tax systems may not be subjected to federal interference.[202]

The court then concluded that "[r]easonable or not, we are bound to implement the statute as it is written" and held that only the transfers made after the plan was confirmed were exempt from the taxation under 1146(c).[203]

Chief Judge Wilkinson wrote separately in concurrence with the court's decision.[204] Wilkinson stated that he did not agree that the plain language of section 1146(c) compelled the court's decision of holding only post confirmation transfers exempt from taxation.[205] The Chief Judge disagreed that section 1146(c) clearly contained a temporal element, and he stated his preference towards making existence of the plan determinative of its coverage, rather than the timing of the confirmation.[206] He stated that "[i]n a complicated reorganization a debtor-in-possession may operate for some time pursuant to the terms of an unconfirmed plan while it negotiates with its creditors. It is far from obvious that those transfers fall outside section 1146(c)."[207]

Furthermore, Chief Judge Wilkinson noted that NVR's reading of the exemption to include transfers prior to the plan's confirmation "comport[s] with a central purpose of our bankruptcy laws: 'permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and

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200. *Id.* at 457.

201. *See id.*

202. *Id.* at 458.

203. *Id.*

204. *See id.* at 458-59 (Wilkinson, C.J., concurring in part and concurring in the judgment).

205. *See id.*

206. *See id.*

207. *Id.*

protect investors.'"[208] The Chief Judge recognized that holding these types of transfers exempt could "provide substantial funds to the debtor," and allow the debtor to "emerge from bankruptcy and thereby to generate substantial long-term tax revenues."[209]

The Chief Judge nevertheless concurred as he found the majority's reading of the statute reasonable.[210] He noted that precedent cautions the judiciary to "proceed carefully" when abrogating the authority of the state and local taxing entities.[211] He concluded that "[i]f Congress wished to exempt a bankrupt from state and municipal taxation, 'the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.'"[212]

4. Analysis.—Justice Holmes succinctly stated in *Rock Island, Arkansas & Louisiana Railroad Co. v. United States*[213] that "[m]en must turn square corners when they deal with the Government."[214] The court's opinion in *NVR* denied a debtor relief because it failed to turn the square corners that federal jurisprudence requires when dealing with state sovereign immunity.

The *NVR* court first decided that the states could properly claim immunity from a debtor's action.[215] In deciding this issue, the court surveyed the methods that it had left open for debtors with claims against the states in a vain attempt to find a fit.[216] Unable to find that the debtors complied with its complicated exceptions, the Fourth Circuit decided that the action could not escape, as it could not be construed as anything less than a "suit against the states" impermissible under the Eleventh Amendment.[217] Second, the court went on to determine what constituted transfers "under a plan confirmed" for tax exemption purposes in circumstances where the defendant's claims of immunity failed.[218] In deciding that the states were immune from the

208. *Id.* at 459 (quoting Toibb v. Radloff, 501 U.S. 157, 163 (1991)) (citing Landmark Land Co. v. Resolution Trust Corp. (*In re* Landmark Land Co.), 973 F.2d 283, 288 (4th Cir. 1992)).

209. *Id.*

210. *Id.*

211. *Id.* (internal quotation marks omitted) (quoting California State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 851-52 (1989) (holding that a court must proceed carefully when construing a federal abrogation of state and local taxing authorities)).

212. *Id.* (quoting Swarts v. Hammer, 194 U.S. 441, 444 (1904)).

213. 254 U.S. 141 (1920).

214. *Rock Island*, 254 U.S. at 143.

215. *See In re NVR*, 189 F.3d at 454; *supra* note 12.

216. *In re NVR*, 189 F.3d at 450-52.

217. *Id.* at 454.

218. *Id.* at 454-58.

bankruptcy procedure,[219] the court diminished the impact of the second issue in the case. Nonetheless, the precedent it established will have far reaching effects. While the decision rendered was safe and correct by its binding precedent, the court failed to consider the fact that the decision will further frustrate and complicate the two purposes of the federal bankruptcy laws.[220] While the court might justify its decision that the debtor simply failed to "turn the square corners" necessary to obtain redress, a closer look at this opinion shows that there may have been no clear corners to turn.

While the court correctly applied Eleventh Amendment principles, it left future debtors with no guidance on how to pursue claims against the states in similar circumstances. The court in *NVR* correctly construed the history of state sovereign immunity and the Eleventh Amendment.[221] Per the Supreme Court's post *Seminole Tribe* jurisprudence, Congress can only abrogate sovereign immunity when it is legislating under the enforcement clause of the Fourteenth Amendment. *Seminole Tribe* held that Congress could not abrogate state sovereign immunity under its Article I powers.[222] Article I, section eight of the Constitution provides that Congress can provide for uniform laws on the subject of bankruptcies throughout the United States and thus provided Congress with the authority to enact the Bankruptcy Code.[223] As such, the court is justified in holding that section 106 was unconstitutional as an attempt to abrogate sovereign immunity under an Article I legislative power.[224]

In *Schlossberg*, however, the Fourth Circuit missed an opportunity to hold that section 106 was constitutional notwithstanding *Seminole Tribe*. The *Seminole Tribe* opinion did not expressly deal with the issue of whether the statute could have been valid under the Fourteenth

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219. *Id.* at 454.

220. The two purposes of the federal bankruptcy laws are "(1) maximization and equitable distribution of the assets of the bankruptcy estate and (2) a fresh start for the debtor." Teresa K. Goebel, *Obtaining Jurisdiction Over States in Bankruptcy Proceedings after* Seminole Tribe, 65 U. CHI. L. REV. 911, 912 (1998) (citing 11 U.S.C. § 727(a)(1); 11 U.S.C. § 1141 (1994)).

221. *See In re NVR*, 189 F.2d at 448-54.

222. *See Seminole Tribe*, 517 U.S. at 72-73. The Court concluded that

> [e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

Id.

223. U.S. CONST. art. I, § 8, cl. 2.

224. *See In re NVR*, 189 F.3d at 450 (*see supra* notes 154-156).

Amendment.[225] As such, nothing in *Seminole Tribe* compels the court's finding that section 106 was not enacted pursuant to Congress's Fourteenth Amendment powers.[226] The court in *Schlossberg* merely relied on the lack of evidence as to Congress's passing section 106 pursuant to the Fourteenth Amendment.[227] The same court, however, in *CSX* noted the wealth of authority[228] that holds that Congress need not state expressly that it is legislating under its Fourteenth Amendment powers for courts to find that the legislation was passed pursuant to the Fourteenth Amendment.[229]

The *NVR* court missed an opportunity to re-examine the possibility that section 106 was enacted under the Due Process Clause of the Fourteenth Amendment.[230] The Due Process Clause reads, "nor shall any State deprive any person of life, liberty, or property, without due process of law."[231] Ned Waxman and David Christian have made the argument that in the bankruptcy context this section requires that no

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225. *See Seminole Tribe*, 517 U.S. at 60. In *Seminole Tribe*, the Court did not consider the validity of the statute under the Fourteenth Amendment because the Seminole Tribe did not challenge the Eleventh Circuit's conclusion that the Act was not passed pursuant to the Fourteenth Amendment. *Id.*

226. The Court's recent post-*Seminole* cases dealing with Congressional abrogation of state sovereign immunity under the Fourteenth Amendment show that the Court will require both extensive evidence that the states are engaging in a pattern of constitutional violations and that the state's own measures are inadequate to remedy the violations before they will find abrogation as a valid remedial measure under the Fourteenth Amendment. *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999), and Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); *see also supra* note 76.

227. *See* Maryland v. Schlossberg (*In re* Creative Goldsmiths of Washington, D.C.), 119 F.3d 1140, 1147 (4th Cir. 1997) ("Because there is no evidence that Congress either passed the Bankruptcy Code under § 5 of the Fourteenth Amendment or sought to preserve the core values specifically enumerated in that amendment, we hold that Congress' effort to abrogate the states' Eleventh Amendment immunity . . . is unconstitutional and ineffective.").

228. *See, e.g.*, Equal Opportunity Employment Comm'n v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (suggesting that Congress need not, "anywhere recite the words 'section 5' or Fourteenth Amendment or 'equal protection'" when legislating under the authority granted by that amendment).

229. *See* CSX Transp., Inc. v. Board of Pub. Works of W. Va., 138 F.3d 537, 540 (4th Cir. 1998) (referring to "the wealth of precedent establishing that Congress's failure to mention that it acted pursuant to Section Five of the Fourteenth Amendment is not dispositive").

230. Section 106 could not be held valid under the Privileges and Immunities Clause of the Fourteenth Amendment as these are limited to eight recognized privileges, not including those arising from bankruptcy. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 7-4, at 555-56 (2d ed. 1988) (reciting the eight privileges recognized by the federal courts); *see also* Twining v. New Jersey, 211 U.S. 78, 97 (1908) (listing some privileges of national citizenship). Furthermore, the Supreme Court has expressed that bankruptcy is not a constitutional right. *See* United States v. Kras, 409 U.S. 434, 446 (1973) (remarking that "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy").

231. U.S. CONST. amend. XIV, § 1.

state deprive any person of property without substantive due process of law.[232] Several justices of the Supreme Court have recognized that the Due Process Clause contains a substantive as well as a procedural element. In *Washington v. Glucksberg*,[233] Justice Souter noted in concurrence that "[t]he text of the Due Process Clause . . . imposes nothing less than an obligation to give substantive content to the words . . . 'due process of law'".[234]

Specifically in *NVR*, section 1146(c) vested NVR with a property right in the exempted taxes.[235] Without section 1146(c), NVR would have no practical way to protect this property right, and thus, the states remain free to deprive NVR of this portion of its estate without substantive due process of law.

In 1999, however, the Supreme Court reinforced that the scope of legislative power granted by the Fourteenth Amendment is remedial and nonsubstantive.[236] Thus, any law passed under Congress's Fourteenth Amendment powers must be shown to have a remedial or corrective purpose and not grant any new substantive rights.[237]

Congress enacted section 106 such that bankruptcy courts could treat States like all the other creditors to a bankrupt's estate and thereby remedy the problem that states' claims of sovereign immunity had engendered by forcing the courts to try and dispose of a bankrupt's estate without all the claimants to the estate represented.[238] In 1994, Congress in further recognition that state claims of sovereign immunity were frustrating the goals of a federal uniform system of

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232. *See* Ned W. Waxman & David C. Christian II, *Federal Powers After* Seminole Tribe: *Constitutionally Bankrupt*, 47 DRAKE L. REV. 467, 491 (1999) (suggesting that the "most logical interpretation of 'without due process of law' is: without the protections provided by the substantive provisions of the Bankruptcy Code against state deprivation of property of the bankruptcy estate").

233. 521 U.S. 702 (1997).

234. *Id.* at 764 (Souter, J., concurring) (citing Poe v. Ullman, 367 U.S. 497, 541-43 (1961) (Harlan, J., dissenting)).

235. *See* Choate v. Trapp, 224 U.S. 665, 673 (1912) ("[T]he provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma.").

236. *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1999) (finding that the Religious Freedom Restoration Act was not remedial and thus exceeded Congress's Fourteenth Amendment Section Five enforcement power).

237. The Court reaffirmed that abrogation provisions must be remedial and nonsubstantive under *City of Borne* in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* and *Kimel v. Florida Board of Regents*; *see supra notes* 76 & 225 (noting the court requirements for Congress to enact a valid abrogation provision under the Fourteenth Amendment).

238. *See* 11 U.S.C. § 106 Historical and Revision Notes, Legislative Statements (Reform Act of 1978) (stating that section 106 indicates that the use of the term "creditor" in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity).

bankruptcy, amended section 106.[239] Section 106 does not grant any new right to debtors; it "merely requires states to adhere to the uniform laws on bankruptcy, as must all other creditors in a bankruptcy case."[240] As such, there is a clear foundation for holding that section 106 is a constitutional use of Congress's remedial power to enforce the Due Process Clause of the Fourteenth Amendment.[241]

The court was not compelled by its precedent to hold section 106 constitutional under the Fourteenth Amendment.[242] However, a review of the viable options that debtors in similar circumstances will now face when seeking equitable relief illustrates the impracticality of the court's decision and the possibility that the decision leaves the debtors without the ability to exercise their federally granted tax relief. In *Collins* and *Antonelli*, the court attempted to provide a mode of redress for debtors and implicitly advocated that debtors not pay the taxes that they thought were exempt.[243] If the states wished to pursue those taxes, they would have to waive their immunity and subject themselves to the jurisdiction of the federal courts.[244] The court conceded in both cases that the states would be in a difficult position if they wished to share in the assets of a bankrupt estate,[245] but nonetheless ruled that the states could not use claims of state sovereign immunity to dictate the outcome of the cases.[246]

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239. *See id.* Congress responded to the Supreme Court's decisions in *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) that abrogation of sovereign immunity be unmistakably clear and unequivocally expressed in order to be given effect and revised § 106 in 1994 (Reform Act of 1994) to make their intent to abrogate state sovereign immunity unmistakably clear.

240. Waxman & Christian, *supra* note 231, at 492.

241. *See id.* at 493 (noting that section 106 "is constitutional as a remedial provision designed to protect property rights in bankruptcy cases from deprivation by states without due process of law").

242. In light of the Court's recent decisions in this area, litigants seeking to hold section 106 constitutional under the Fourteenth Amendment must not only show that the legislation is remedial in nature but also extensive evidence of a pattern of constitutional violations by the state and inadequate state remedies to these violations. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, and *Kimel v. Florida Board of Regents*; *see supra notes* 76, 225 & 238 (discussing *Florida Prepaid* and *Kimel*'s impact on abrogation under the Fourteenth Amendment).

243. *See* Virginia v. Collins (*In re* Collins), 173 F.3d 924, 930 (4th Cir. 1999) (stating that "[i]n short, if a state wishes to share in the estate, it must submit to federal jurisdiction"); Maryland v. Antonelli Creditor's Liquidating Trust, 123 F.3d 777, 787 (4th Cir. 1997) ("The state, of course, well may choose not to appear in federal court. But that choice carries with it the consequence of foregoing any challenge to the federal court's actions.").

244. *See In re Collins*, 173 F.3d at 930-31; *Antonelli*, 123 F.3d at 787.

245. *See In re Collins*, 173 F.3d at 931 (placing states in a "tough spot"); *Antonelli*, 123 F.3d at 787 (creating a choice that is not "ideal").

246. *In re Collins*, 173 F.3d at 926; *Antonelli*, 123 F.3d at 786-87.

This remedy, however, would be essentially meaningless to a debtor like NVR. NVR was in the business of building and selling real estate.[247] If they did not pay the stamp and recording taxes that section 1146(c) held as exempt, they would be unable to transfer properties and their business would be brought to a standstill.[248] Without the ability to continue transferring properties, there was no way for NVR to reorganize and to emerge from bankruptcy.[249] As such the "withhold payment until the state makes a claim" remedy that the court advocated in the past provides no relief for a debtor like NVR whose day to day business depends upon clarity in its tax procedures.

The debtor could seek an *Ex parte Young* injunction to prevent the taxing authorities from enforcing the stamp and recordation taxes that section 1146(c) exempted.[250] This federal injunction, if recognized by all of the state and local taxing authorities[251] might allow a debtor in the real estate business to continue its operations while in bankruptcy. Considering the second part of the court's holding,[252] however, a debtor seeking to use this mode of redress would have to file for bankruptcy, have the agreement of all its creditors regarding its reorganization plan, have the court approve the plan, and be granted *Ex parte Young* injunctions against all of the state and local taxing authorities, all on the same day, to take full advantage of the 1146(c) tax exemption.[253]

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247. *See In re NVR*, 189 F.3d at 447.

248. *See* Brief for Appellee at 13, *In re NVR* (No. 98-2211) (stating that "[t]he acquisition and sale of sufficient properties during the chapter 11 period was the crucial factor in insuring NVR's survivability").

249. *Id.*

250. *See supra* notes 62-64 and accompanying text (discussing the *Ex parte Young* doctrine).

251. The Tax Injunction Act of 1937 28 U.S.C. § 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Thus, whether a federal injunction will be recognized in these circumstances depends on whether the various state courts where NVR transacts business will provide a "plain, speedy, and efficient" remedy to allow NVR to take advantage of the federal tax injunction embodied in 1146 (c). *See, e.g.*, California v. Grace Brethren Church 457 U.S. 393, 412 & n.28 (1982) (noting that a refund remedy conditioned by payment under protest was "adequate" and Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 303 (1952) (finding a state remedy that would require the filing of over three hundred separate claims in fourteen different counties to protect a single federal claim asserted by the taxpayer was not "efficient" under the statute).

252. *See In re NVR*, 189 F.3d at 458 (holding that post petition pre-confirmation transfers were not exempted from taxes owed).

253. Under the second part of the court's holding in *In re NVR*, in which the court held that post petition pre-confirmation transfers were not exempted from taxes owed, *In re NVR*, 189 F.3d at 458, a debtor would have to file for bankruptcy, have the agreement of all

If the court continues to follow the *Seminole Tribe* reasoning, however, it might even find that *Ex parte Young* injunctions are not available to the debtor.[254] The Fourth Circuit would have to look to the relief that Congress intended in bankruptcy actions against the states.[255] Due to the existence of abrogation in the Bankruptcy Code under section 106, the court might conclude that a litigated settlement between the debtor and the state, and not *Ex parte Young* injunctions, was the relief Congress intended when a debtor has a claim against a State in Bankruptcy. As such, injunctions might be held impermissible as beyond Congress's intention in the Bankruptcy Code.

Thus, the debtor would be forced to pursue a remedy in state court and attempt, under the Supremacy Clause, to have the state courts uphold the section 1146(c) federal tax exemption.[256] However, here the debtor would have to overcome the states' common law claims to sovereign immunity in their own courts.[257]

Practically, getting state court orders that the taxes were exempt from all the states that a national real estate developer deals with would take so much time that this remedy would be so inefficient as to be without value.[258] Thus, without a means for getting the tax exemption enforced against the state taxing authorities,[259] the tax exemption becomes worthless, and Congress's purpose in enacting section

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its creditors regarding its reorganization plan, have the court approve the plan, and seek the *Ex parte Young* injunction on the same day to get full relief.

254. *See supra* note 68 (discussing the limiting effect that *Seminole Tribe* may have upon scope of future *Ex parte Young* injunctions).

255. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 74 (1996) (concluding that "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have in suits against federal officers, refused to supplement that scheme with one created by the judiciary").

256. *See* Richard Lieb, *Eleventh Amendment Immunity of a State in Bankruptcy Cases: A New Jurisprudential Approach*, 7 AM. BANKR. INST. L. REV. 269, 331-33 (1998) (noting that if the Eleventh Amendment were to bar the proceeding from being conducted in a bankruptcy court then the proceeding would have to be brought in a state court).

257. *See id.* at 331-33 (1998) (noting that "the abrogation or waiver of a state's Eleventh Amendment immunity . . . does not necessarily waive the state's own non-Eleventh Amendment (common law) sovereign immunity from suits in its own courts").

258. *See, e.g.*, Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 303 (1952) (finding a state remedy that would require the filing of over three hundred separate claims in fourteen different counties to protect a single federal claim asserted by the taxpayer was not an "efficient" remedy under the Tax Injunction Act of 1937 and thus did not allow the taxpayer to exercise its federal claim).

259. The federal courts may find that requiring a debtor to obtain state court orders from the numerous state courts is so inefficient as to effectively prevent the debtor from exercising his federal tax exemption. As such, even under the recently announced heightened standards for federal abrogation of state sovereign immunity under the Fourteenth Amendment, the federal courts could find that the state remedy is so inadequate as to justify federal abrogation under the Fourteenth Amendment; *see supra* notes 76, 225, 238 &

1146(c), giving debtors a form of relief such that they can reorganize and emerge as viable tax revenue producing entities, is frustrated.

The court rested its determination that the section 9014 motion was a suit under the Eleventh Amendment on the fact that the proceeding required that the court raid the state's treasuries.[260] This aspect of the court's holding is again safe and correct under Supreme Court precedent holding that actions impacting a state's treasury are almost per se suits against the states under the Eleventh Amendment.[261]

In the second main issue of the case, the court considered what constitutes a transfer "under a plan confirmed" under section 1146(c).[262] This issue took on a less important role after the court found the states immune from the jurisdiction of the court because the majority of the taxes were paid to the states.[263] While the court's decision on this issue is justifiable and safe, the court again failed to consider the practical effects of its decision and the impact of its holding on bankruptcy reorganizations.

The court focused on the language used in section 1146(c) and not its role in the bankruptcy setting.[264] The court based its holding on the dictionary definition of the word "under" finding the transfers that occurred before the plan's confirmation not technically carried out "under" the authority of a "plan confirmed."[265] The court also relied upon the Supreme Court's holding in *California State Board of Equalization v. Sierra Summit, Inc.*[266] to justify a narrow construction of section 1146(c) favoring the state.[267]

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243 (discussing *Florida Prepaid* and *Kimel*'s impact on Congress's ability to pass valid remedial legislation under the Fourteenth Amendment).

260. *See In re NVR*, 189 F.3d at 454.

261. *See* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 48-49 (1994) (noting that the primary factor in determining whether a state can claim immunity is whether the action directly impacts the state treasury); Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 464 (1945) ("We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding.").

262. *See In re NVR*, 189 F.3d at 454-58.

263. *Id.* at 454. Since the states were found immune from the proceeding, the remainder of the opinion only deals with the transfer and recording taxes assessed against the debtor by the local taxing authorities who do not enjoy sovereign immunity.

264. *See In re NVR*, 189 F.3d at 455-58; *see also supra* note 203.

265. *Id.* at 457.

266. 490 U.S. 844 (1989).

267. *See In re NVR*, 189 F.3d at 457. The *NVR* court was guided by the language of the *Sierra Summit* opinion which stated that "[a]lthough Congress can confer an immunity from state taxation, . . . a court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not clearly expressed." *Id.* at 457 (quoting *Sierra Summit*, 490 U.S. at 851-52).

The court's holding ignores the Supreme Court mandate that statutes should be interpreted by the courts in accordance with their clear purpose and context.[268] The Court of Appeals for the Second Circuit in *In re Jacoby-Bender, Inc.* did not hesitate to look to the purpose of section 1146(c) and find that a transfer not mentioned in the plan could be under the confirmed plan.[269] While the Fourth Circuit in *NVR* correctly noted that the nonspecified transfer in *Jacoby-Bender* was post confirmation, it completely ignored the court's commentary regarding the basis of its holding.[270] In *Jacoby-Bender*, the Second Circuit stated that "Congress's apparent purpose in enacting section 1146(c) was to facilitate tax relief."[271] The court continued, "where, as here, a transfer, and hence an instrument of transfer, is necessary to the consummation of a plan, the plan seems implicitly to have 'dealt with' the transfer instrument."[272]

Other lower federal courts in the Second Circuit have construed the holding in *Jacoby-Bender* as support for the proposition that all transfers "necessary" or "essential" to the confirmed plan are under a plan confirmed and exempted by section 1146(c).[273] While the court in *NVR* attempted to distinguish *Jacoby-Bender* and its progeny,[274] it should have considered the fact that all the transfers that NVR made during its time in bankruptcy were not just necessary, but critical to its

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268. *See, e.g.*, United States v. Hiers of Boisdore, 49 U.S. 113, 122 (1849) (noting that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy").

269. *See* City of New York v. Jacoby-Bender, Inc. (*In re* Jacoby-Bender Inc.), 758 F.2d 840, 841-42 (2d Cir. 1985) (relying on statutory purpose and legislative history in addition to plain meaning to determine whether the debtor was exempt under a confirmed reorganization plan).

270. *See In re NVR*, 189 F.3d at 455-56.

271. *In re Jacoby-Bender*, 758 F.2d at 841.

272. *Id.* at 842.

273. *See* City of New York v. Smoss Enters. Corp. (*In re* Smoss Enters. Corp.), 54 B.R. 950, 951 (E.D.N.Y. 1985) (applying *Jacoby-Bender* and finding that "the transfer of the property was essential to the confirmation of the plan"); *In re* Permar Provisions, Inc., 79 B.R. 530, 534 (E.D.N.Y. 1987) (holding that the legal standard to determine if the sale of property was made under a plan confirmed is whether the sale was essential to the confirmation of the plan).

274. *See In re NVR*, 189 F.3d at 455-56. While *Jacoby-Bender* itself dealt with a post confirmation transfer, *Smoss* and *Permar* dealt with pre-petition post confirmation transfers similar to those dealt with in NVR. *See In re Smoss*, 54 B.R. at 951 (holding that the post confirmation transfer was exempted because, "the transfer was contemplated by the Bankruptcy Court when it ruled on the [debtor's] application for exemption"); *In re Permar*, 79 B.R. at 534 (holding that the post-petition, pre-confirmation sale of real property was under a plan confirmed as the sale was essential to the confirmation of the plan).

emergence from bankruptcy.[275] As the Second Circuit noted, Congress enacted section 1146(c) to provide tax relief and to promote reorganization.[276] As outlined in the Appellees Brief, the transfers and their exempt status allowed NVR to reorganize and eventually emerge from bankruptcy with satisfied creditors.[277] The Bankruptcy Court even noted that NVR was a "textbook example" of how a successful reorganization should work.[278]

NVR operated for fifteen months[279] prior to the plan's confirmation, and the exempt status of the transfers allowed NVR to convince its creditors that it could reorganize and emerge.[280]

Furthermore, NVR acted under the auspices of the Bankruptcy Court from the moment it filed bankruptcy, and the court decided to allow it to continue to operate as a debtor in possession.[281] Because all of NVR's transactions occurred under the auspices of the Bankruptcy Court, all of the transfers could be construed in connection with the eventual plan and subject to section 1146(c).[282] By holding otherwise, the court's decision will have the perverse effect of encouraging debtors to stay in reorganization for longer periods of time in order to reap the benefits of the tax exemption after plan confirmation.

A more purpose-oriented construction of section 1146(c) would facilitate rapid reorganization, one of the fundamental aims of bankruptcy, and would allow debtors to minimize the time that they spend under the court's jurisdiction. The court's holding in *NVR* will cause debtors to seek to remain in reorganization longer and thus waste the judicial resources of the bankruptcy court. In his concurrence, Chief

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275. *See* Brief for Appellee at 17, *In re NVR* (No. 98-2211) (quoting the Bankruptcy Court's language that the transfers were "necessary to [NVR's] emergence from bankruptcy" (internal quotation marks omitted)).

276. *See supra* notes 269-272 and accompanying text (discussing the *Jacoby-Bender* court's reliance on the purpose of section 1146(c)).

277. *See* Brief for Appellee at 17, *In re NVR* (No. 98-2211) (remarking that "[t]he revenues [the transfers] generated allowed NVR to convince the market that NVR had a viable Plan, and a viable future").

278. *Id.* at 18 (internal quotation marks omitted).

279. NVR operated from April 6, 1992 to July 22, 1993. *See id.* at 10-14. The chapter 11 was filed on April 6, 1992, and the Bankruptcy Court confirmed the plan on July 22, 1993. *See id.*

280. *See id.* at 16-18.

281. *See id.*

282. *See id.* at 17-18 (noting that the Bankruptcy Court found and the parties did not dispute that all of the transfers were made under the jurisdiction and with the authorization of the Bankruptcy Court).

Judge Wilkinson noted the impracticalities of the court's holding.[283] While eventually agreeing that the court's interpretation was "reasonable,"[284] he noted the lack of a plain "temporal element" in section 1146(c) and said that it was unclear that section 1146(c) required the exclusion of post petition pre-confirmation transfers.[285] He suggested that "reading the phrase [under a plan confirmed] to require only that the plan ultimately be confirmed would comport with a central purpose of our bankruptcy laws: 'permitting business debtors to reorganize and restructure their debts in order to revive the debtors' businesses and thereby preserve jobs and protect investors.'"[286] The Chief Judge also noted that in a complicated reorganization, a debtor in possession may operate for months under an unconfirmed plan and that the substantial funds that section 1146(c) may provide to the debtor "would permit the debtor to emerge from bankruptcy and thereby to generate substantial long-term tax revenues."[287] The Chief Judge's concurrence notes the practical adverse affects that the holding may have on bankruptcy reorganizations.

The state sovereign immunity issue will continue to appear before the courts as statistics show that in 1996, states are creditors in twenty-five percent of all bankruptcy cases and hold claims of over 3.6 billion.[288] Thus, to effectuate the two purposes of bankruptcy,[289] the bankruptcy courts need to continue to find ways to render decisions and orders that impact the States. As Congress recognized in drafting and re-drafting section 106 of the Bankruptcy Code, bankruptcy courts need to be able to settle all the claims for and against a bankrupt's estate, including the claims that involve the States as a creditor.[290] By continuing to hold section 106 unconstitutional, the court creates confusion and disorder through out the bankruptcy process and will inevitably lead to further cases appearing before the Fourth Circuit.

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283. *See In re NVR*, 189 F.3d at 458-59 (Wilkinson, C.J., concurring in part and concurring in the judgment).

284. *Id.* at 459.

285. *Id.* at 458-59.

286. *Id.* at 459 (quoting Toibb v. Radloff, 501 U.S. 157, 163 (1991)).

287. *Id.*

288. *See* Statistics Division, Administrative Office of the United States Courts, Special Tables, Table F-2 for the Twelve-Month Period Ended Dec. 31, 1998 (tables on file with the Statistics Division).

289. *See* 11 U.S.C. § 727(a)(1) and 11 U.S.C. § 1141.

290. *See* 11 U.S.C. § 106 (Reform Act of 1994); *see also* COLLIER ON BANKRUPTCY § 106.LH (Lawrence P. King ed., 15th ed. 1999) (noting that Section 106 was amended in order to make clear Congress's intent to abrogate sovereign immunity).

5. Conclusion.—Justice Holmes pointed out that, "[m]en must turn square corners when they deal with the Government,"[291] and in the area of state sovereign immunity debtors can expect to face many square corners. *NVR*, however, illustrates that there are times when even "turning square corners" will not suffice when seeking relief in the federal courts. As the analysis illustrates, the Fourth Circuit's jurisprudence may not provide a debtor in NVR's circumstances any method to seek relief. This inequitable result typifies the confused and impractical effects that the Supreme Court's holding in *Seminole Tribe* has had on lower federal courts throughout the country in exclusively federal cases. Critics and federal judges are now seeking the "Magic Bullet to Beat *Seminole*."[292] Unless the Supreme Court or Congress reviews and resolves the difficulties that *Seminole Tribe* has created, state sovereign immunity will continue to leave litigants with federal causes of action against the states with potentially un-navigable modes of redress.

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291. Rock Island, Ark. & La. R.R. Co. v. United States, 254 U.S. 141, 143 (1920).

292. Mark Browning, *A Magic Bullet to Beat* Seminole?, 17 AM. BANKR. INST. J. 10, 10 (1998) (describing methods to be used to avoid the effects of *Seminole* on debtors).

II. CONSTITUTIONAL LAW

A. *The First Amendment Challenge of the "Reasonable Likelihood" Standard for Restricting Lawyer Speech*

In *In re Morrissey*,[1] the Court of Appeals for the Fourth Circuit examined the constitutionality of a Local Rule of the Eastern District of Virginia (Local Rule 57)[2] that restricts lawyer speech on certain topics during pending criminal litigation.[3] Specifically, the court considered whether Local Rule 57 was unconstitutionally vague in violation of the First Amendment.[4] Local Rule 57 prohibits an attorney's dissemination of information or opinion about a pending case when there is a "reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."[5]

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1. 168 F.3d 134 (4th Cir. 1999), *cert. denied*, 119 S. Ct. 2394 (1999).

2. Local Rule 57 provides, in part:

(A) Potential or Imminent Criminal Litigation: In connection with pending or imminent criminal litigation with which a lawyer or a law firm is associated, it is the duty of that lawyer or firm not to release or authorize the release of information or opinion (1) if a reasonable person would expect such information or opinion to be further disseminated by any means of public communication, and (2) if there is a *reasonable likelihood that such dissemination would interfere with a fair trial or otherwise prejudice the due administration of justice.*

. . .

(C) Pending Criminal Proceedings—Specific Topics: From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the termination of trial or disposition without trial, a lawyer or a law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be further disseminated by any means of public communication, if such statement concerns:

. . .

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

. . .

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case. D. E.D.Va. R. 57.

U.S. DIST. CT. RULES E.D. VA., Local Criminal Rule 57 (emphasis added).

3. *See Morrissey*, 168 F.3d at 137-41.

4. *Id.* at 137-38; *see also* U.S. CONST. amend. I. The First Amendment Freedom of Speech Clause provides in part: "Congress shall make no law . . . abridging the freedom of speech." Under the test established in *Procunier v. Martinez*, 416 U.S. 396 (1974), a regulation proscribing lawyer speech "must further an important or substantial government interest . . . [and] the limitation on First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413.

5. U.S. DIST. CT. RULES E.D. VA., Local Criminal Rule 57(A)(2); *see also supra* note 2.

The court rejected the appellant's argument that recent Supreme Court precedent permitted the restriction of an attorney's speech only if there was a "substantial likelihood" of material prejudice, and held, based on its own earlier precedent, that "the 'reasonable likelihood' standard is sufficiently narrowly tailored to pass constitutional muster."[6]

This Note examines the precedent and tests employed by courts to balance free speech and Sixth Amendment rights,[7] in addition to arguing that, for reasons of consistency and due respect for an attorney's free speech rights, the "reasonable likelihood of prejudice" test upheld in *Morrissey* should be overturned in favor of the "substantial likelihood of material prejudice" test endorsed by the Supreme Court.[8]

1. The Case.—On January 16, 1997, Joel W. Harris, a long-time political operative and former mayoral aide, was indicted on state drug distribution charges.[9] The following day he hired appellant Joseph D. Morrissey as his attorney.[10] Due to Harris's political connections and the salacious details of the alleged crime, his indictment drew substantial media coverage in the Richmond area.[11] The state prosecutors were hampered by accusations of partisanship on the part of local officials investigating the case.[12] Eventually, political pressure overwhelmed the investigation, and the case was moved to federal court.[13]

In preparation for the trial, Morrissey hired investigator James "Bubba" Bates, who helped him determine the identity of various

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6. *Morrissey*, 168 F.3d at 139-40.

7. *See* U.S. CONST. amend. VI. The Sixth Amendment to the United States Constitution states, in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

8. *See infra* notes 89-97 (discussing Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)).

9. *See Morrissey*, 168 F.3d at 136.

10. *See id.*

11. *See id.* (noting that "[t]he indictment alleged that Harris had exchanged drugs for sexual favors"); Brief of the United States as Appellee at 4-5, *In re* Morrissey, 168 F.3d 134 (4th Cir. 1999) (No. 98-4168) (describing witness testimony before the grand jury in which the alleged distribution of cocaine was said to have taken place in the context of group sex and orgies at Harris's home).

12. *See Morrissey*, 168 F.3d at 136.

13. *See id.*

grand jury witnesses including John Buerkley.[14] Bates set up an interview between Morrissey and Buerkley.[15] During the interview, which Morrissey videotaped, Buerkley recanted much of his grand jury testimony,[16] as well as previous statements he had made to law enforcement officers.[17] Neither Morrissey nor Bates disputed the fact that they were aware that Buerkley would be called as a government witness during trial.[18]

Two days after this interview, Harris was indicted on federal drug distribution charges.[19] The indictment included allegations that he had traded drugs for sexual favors—licentious details that added to the media frenzy in the Richmond area.[20] On the same day, James B. Comey, the Assistant United States Attorney assigned to the case, sent Morrissey a copy of the indictment and enclosed a copy of Local Rule 57 regarding extrajudicial statements in a criminal case.[21] Because Morrissey had a reputation for aggressive use of the media in high-profile criminal cases, "Comey felt the need to remind [him] of the applicability of Local Rule 57 because . . . comments similar to the ones that Morrissey had previously made during the state proceedings would be prohibited in federal court under this rule."[22] For example, Morrissey held a press conference shortly before Harris's federal indictment where he (Morrissey) said that the witnesses in the case were "a plate of cockroaches that the locals were trying to get Helen Fahey [the U.S. Attorney] to take."[23]

On February 11, 1997, attorney John Honey, counsel for another potential government witness against Harris, telephoned Morrissey to warn him against approaching Honey's client for an interview.[24] During that conversation, Morrissey told Honey that he had scheduled a press conference for that afternoon and had planned to show the videotaped interview of Buerkley recanting his grand jury testimony.[25]

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14. *See id.*

15. *See id.*

16. *See id.*

17. *See* Appellee's Brief at 5-6, *Morrissey* (No. 98-4168).

18. *See Morrissey*, 168 F.3d at 136.

19. *See id.*

20. *See id.*

21. *See* Appellee's Brief at 6, *Morrissey* (No. 98-4168).

22. *Morrissey*, 168 F.3d at 136.

23. Appellee's Brief at 7, *Morrissey* (No. 98-4168) (quoting testimony of Assistant U.S. Attorney Comey).

24. *See Morrissey*, 168 F.3d at 136.

25. *See id.*

Morrissey also told investigator Bates, and Buerkley's counsel Augustus Hydrick, about the planned press conference.[26] Both Hydrick and Bates suggested to Morrissey that he not hold the press conference for fear it would jeopardize future attempts to interview other witnesses.[27] Hydrick later testified that Morrissey said he needed to do it to send a message to the other witnesses[28] and to "rock their world."[29] Comey also found out about the press conference and faxed Morrissey a letter that again highlighted Local Rule 57, in particular, subsections (C)(4) and (C)(6).[30] Comey's letter strongly recommended that Morrissey cancel.[31] Morrissey went ahead with the press conference anyway during which he played the videotape of Buerkley's recantation.[32] The event received extensive television and print media coverage throughout the Richmond area.[33]

After the press conference, Morrissey responded to Comey's letter, claiming that he had discussed Local Rule 57 with three former prosecutors and, based on their advice, decided to proceed with the press conference[34]—a contention that was later discredited during the show cause hearings.[35] Morrissey also attempted to justify his actions by insisting that his statements to the media only dealt with the state case and the tainting of witnesses before the state grand jury.[36] At that time, all state charges against Harris had been dismissed and only federal charges remained.[37] According to investigator Bates, Morrissey called the press conference to shake up other witnesses.[38] Morrissey, on the other hand, claimed that he meant only to induce others to come forward.[39] But as may have been anticipated, these acts rattled several potential witnesses including one who threatened to recant his testimony just to avoid testifying at trial.[40]

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26. *See id.*

27. *See id.*

28. *See id.*

29. Appellee's Brief at 9, *Morrissey* (No. 98-4168).

30. *See id.*; *see also supra* note 2 (quoting relevant portions of Local Rule 57).

31. *See Morrissey*, 168 F.3d at 136.

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.* at 136; *see also* Appellee's Brief at 11 n.5, *Morrissey* (No. 98-4168) (discussing Morrissey's claim that he had spoken to three former prosecutors and quoting testimony from *In re Morrissey*, 996 F. Supp. 530, 534 (E.D. Va. 1998)).

36. *See Morrissey*, 168 F.3d at 137.

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

The day after the press conference, the district judge issued a show cause order to Morrissey.[41] It charged him with willfully violating Local Rule 57 by holding a press conference to discuss information and the credibility of a prospective government witness in a pending criminal proceeding.[42] At Morrissey's February 19th show cause hearing, the district court judge reminded both sides about Local Rule 57 and warned of harsh punishment for future violations.[43]

Two weeks before Harris's trial was to begin, in an interview with a local newspaper reporter, Morrissey again made public statements about the case.[44] He stated that the charges against Harris were vindictive and vicious and claimed that if these charges had been filed when he was a prosecutor, they would have been laughed out of court.[45] Based on these comments, the court issued a second show cause order to Morrissey and again charged him with willfully violating Local Rule 57 by making statements to a newspaper reporter regarding the merits of Harris's pending case.[46]

Morrissey moved to dismiss the show cause orders, arguing that Local Rule 57 impermissibly infringed on his right to free speech.[47] The district court denied the motion to dismiss and conducted a bench trial on the charges.[48] At trial, the district court found that Morrissey knowingly and willfully violated Local Rule 57, in particular, sections (C)(4) and (C)(6).[49] Those sections prohibit attorneys from making public statements concerning the identity, testimony, or credibility of prospective witnesses, and from giving any opinion as to the merits of a pending case.[50] The court held that Morrissey's actions were reasonably likely to adversely affect the jury pool, to make jury selection more difficult, and to interfere with prospective witnesses.[51] Subsequently, the court found him guilty of two violations of Local Rule 57 and sentenced him to ninety days imprisonment and three

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41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.*; *see also* Appellee's Brief at 12-13, *Morrissey* (No. 98-4168) (quoting Morrissey's exact words).

46. *See Morrissey*, 168 F.3d at 137.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See* U.S. DIST. CT. RULES E.D. VA., Local Criminal Rule 57(C)(4), (C)(6).

51. *Morrissey*, 168 F.3d at 137 (summarizing the holding in *In re* Morrissey, 996 F. Supp. 530 (E.D. Va. 1998)).

years probation.[52] In addition, Morrissey was suspended from practicing law in the Eastern District of Virginia for two years.[53]

Basing his argument on the Supreme Court decision in *Gentile v. State Bar of Nevada*,[54] Morrissey appealed the district court's finding that Local Rule 57 does not violate the First Amendment.[55] More specifically, he claimed that the *Gentile* holding implied that the "reasonable likelihood" standard was unconstitutional, arguing that it and the "substantial likelihood of material prejudice" standard cannot both be sufficiently narrowly tailored so as to withstand a constitutional challenge.[56]

2. *Legal Background.*—

a. The Supreme Court's Early Guidelines for Lawyer Speech.—As early as 1887, lawyers were officially warned to "Avoid Newspaper Discussion of Legal Matters."[57] At least one state reasoned that "[n]ewspaper publications by an attorney as to the merits of pending or anticipated litigation . . . tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice."[58] In 1908, the American Bar Association published its own code entitled "Canon of Professional Ethics" that was thereafter adopted by many states.[59] Canon 20 of that ABA code stated: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and may otherwise prejudice the due administration of justice. Generally they are to be condemned."[60]

In the mid-1900s, the Supreme Court heard several cases involving a court's right to suppress free speech and freedom of the press in the interest of fair trials and due process. *Bridges v. California*,[61] for example, involved a contempt of court charge for the publisher and managing editor of a California newspaper. The newspaper printed an editorial that strongly advocated harsh sentences for two union en-

52. *Id.*

53. *See id.*

54. 501 U.S. 1030 (1991).

55. *See Morrissey*, 168 F.3d at 137.

56. *See* Appellant's Opening Brief at 4, 6-9, *Morrissey* (No. 98-4168).

57. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1066 (1991) (internal quotation marks omitted) (quoting ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY (1887)).

58. *Id.* (internal quotation marks omitted) (alterations in original) (quoting H. DRINKER, LEGAL ETHICS 23, 356 (1953)).

59. *See id.*

60. *Id.* (internal quotation marks omitted) (quoting ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 20 (1908)).

61. 314 U.S. 252 (1941).

forcers convicted of assaulting nonunion truck drivers[62] and sent a telegram to the Secretary of Labor while a motion for new trial was pending in a case between the two unions.[63]

A 5-4 Court overturned the contempt charges and found that "the judgments below result in a curtailment of expression that cannot be dismissed as insignificant."[64] The majority explained that "[i]f they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert."[65] Justice Black's majority opinion acknowledged the high standards of previous cases that required a "clear and present danger" of bringing about the particular evil in question[66] and stated that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[67] As evidenced by this decision, a high bar protecting First Amendment rights was being set.

In language that would seem to contradict the "reasonable likelihood" standard of Local Rule 57, the *Bridges*'s Court held that "[i]n accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' [of speech to interfere with the orderly administration of justice] is enough to justify a restriction of free expression."[68] Justice Frankfurter, on the other hand, offered a spirited dissent in *Bridges*, making counter arguments that supported speech restrictions in exchange for impartial justice.[69] "Free speech," he said, "is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights."[70] Justice Frankfurter continued:

> Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched

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62. *See id.* at 271-76.

63. *See id.* at 275-76. The telegram warned of a strike that would tie up the port of Los Angeles and involve the entire Pacific Coast. *See id.* at 276.

64. *Id.* at 270.

65. *Id.*

66. *Id.* at 260-64 (citing, among others, *Schenck v. United States*, 249 U.S. 47, 52 (1919) (using "clear and present danger" language), and *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (stating that the "danger apprehended [must be] imminent")).

67. *Id.* at 263.

68. *Id.* at 272-73 (citation omitted).

69. *Id.* at 279-305 (Frankfurter, J., dissenting).

70. *Id.* at 282.

> from its rational tracks into the more primitive melee of passion and pressure. The need is great that courts be criticized but just as great that they be allowed to do their duty.[71]

Finally, Frankfurter asked the majority not to "indulge in an idle play on words" in adjudicating the constitutionality of speech that has a "clear and present danger" of affecting impartial justice as opposed to just a "reasonable tendency" to do the same.[72] The circumstances of the particular case, he argued, would control the resolution of the conflict.[73] As will be seen, the fractured decision in *Gentile* demonstrates that both sides of the *Bridges*'s argument have survived decades of First Amendment jurisprudence.[74]

In 1966, the Supreme Court reeled in freedom of speech and press a bit with its decision in *Sheppard v. Maxwell*[75]—the sensational murder case that spawned a media frenzy, not to mention television shows and movies.[76] The appellant, Dr. Samuel Sheppard, claimed that his due process rights were violated because the state trial judge allowed prejudicial publicity and disruptive influences in the courtroom.[77] The Supreme Court agreed and cited a litany of cases as support including *Bridges*[78] and *Pennekamp v. State of Florida*.[79] The majority also cited Justice Oliver Wendell Holmes and his adherence to the "undeviating rule" that "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence

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71. *Id.* at 284.

72. *Id.* at 295-96.

73. *Id.* at 296.

74. *See infra* notes 109-112 and accompanying text.

75. 384 U.S. 333 (1966).

76. Both the television show and the movie based on this case were called *The Fugitive*. They told the fictional story of a doctor who is falsely accused of murdering his wife, escapes from custody, and attempts to hunt down the real killer while avoiding recapture. Harrison Ford and Tommy Lee Jones starred in the 1993 motion picture. THE FUGITIVE, Warner Bros. (1993).

77. *See Sheppard*, 384 U.S. at 338-45, 349-58 (describing various aspects of carnival-like pre-trial and trial media activity including "the erection of a press table for reporters inside the bar [which was] unprecedented"). *Id.* at 355.

78. *Id.* at 350 (quoting *Bridges*, 314 U.S. at 271, for the proposition that "[l]egal trials are not like elections, to be won through the use of the meeting hall, the radio and newspaper").

79. *Id.* (quoting *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946), for the proposition that "[f]reedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice" (internal quotation marks omitted)). *Pennekamp* discussed the constitutionality of a contempt conviction. Appellants were responsible for the publication of two editorials charged to be "unlawfully critical of the administration of criminal justice in certain cases then pending before the [Dade county circuit] Court." *Pennekamp*, 328 U.S. at 333.

and argument in open court, and not by any outside influence, whether of private talk or public print."[80]

Perhaps *Sheppard*'s most far reaching lesson, which supports limits on lawyer speech when it has a reasonable tendency to have prejudicial effect, comes near the end of the opinion. There, the Court warned that, "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."[81] Consequently, the *Sheppard* Court advised that "the cure lies in those remedial measures that will prevent the prejudice at its inception."[82]

The 1974 case, *Procunier v. Martinez*,[83] added yet another litmus test to be applied when considering the constitutionality of free speech restrictions.[84] Specifically, *Martinez* employed a two-prong test to gauge the constitutionality of a given restriction: a restriction (1) must further one or more of the important and substantial governmental interests involved, and (2) must be no greater than is necessary to further the legitimate governmental interest involved.[85] The governmental interest in securing fair trials and the impartial administration of justice passes the first part of the test easily.[86] After all, as Justice Frankfurter stated, "[t]he administration of justice by an impartial judiciary has been basic to our conception of freedom ever since the Magna Carta."[87] It is the second prong wherein lies the rub—how do we determine if a restriction is "no greater than necessary [or essential]"[88] to further the interest involved? Seventeen years

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80. *Id.* at 351 (internal quotation marks omitted) (quoting Patterson v. Colorado *ex rel.* Attorney Gen., 205 U.S. 454, 462 (1907)).

81. *Id.* at 363.

82. *Id.* The court noted that "[t]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.*

83. 416 U.S. 396 (1974).

84. *See id.* at 413. *Martinez* involved a California prison's censorship of prisoner mail and a ban against the use of law students to conduct attorney-client interviews with inmates. *Id.* at 398.

85. *See id.* at 411, 413 (referencing *United States v. O'Brien*, 391 U.S. 367, 377 (1968), where the Court used a similar approach to determine whether a law prohibiting the burning of selective service registration certificates was a justified infringement on free expression).

86. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1057 (1991) (plurality opinion) (opinion of Kennedy, J.) ("If as a regular matter speech by an attorney about pending cases raised real dangers [of a kind that burdens the judicial process], then a substantial governmental interest might support additional regulation of speech.").

87. Bridges v. California, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting).

88. *See supra* note 85 and accompanying text (outlining the two-prong test for constitutionality in *Procunier v. Martinez*, 416 U.S. 396 (1974)).

after *Martinez*, the Supreme Court would try to answer that very question in *Gentile v. State Bar of Nevada*—a case almost directly on point with *Morrissey*.

In *Gentile*, a divided Court ruled that Nevada Supreme Court Rule 177 (Rule 177),[89] as applied to the appellant Gentile, was void for vagueness.[90] Rule 177, a Nevada Court regulation very similar to Local Rule 57, prohibited a lawyer from making extrajudicial statements to the press that he "knows or reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[91]

Perhaps most important to the issue at hand, Chief Justice Rehnquist concluded in his majority opinion (as to Parts I and II) that a "clear and present danger" to fair and impartial adjudication need not be present because the "'substantial likelihood of material prejudice' standard applied by Nevada and most other States satisfies the First Amendment."[92] The Chief Justice also noted that, because lawyers are officers of the court, their speech may be more heavily regulated than

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89. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, App. B. Rule 177 provides, in part:

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

. . .

3. Notwithstanding subsection 1 and 2(a-f), a lawyer involved in the investigation or litigation of a matter may state without elaboration:
   (a) the general nature of the claim or defense;
   (b) the information contained in a public record;
   (c) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;
   (d) the scheduling or result of any step in litigation;
   (e) a request for assistance in obtaining evidence and information necessary thereto;
   (f) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
   (g) in a criminal case:
      (i) the identity, residence, occupation and family status of the accused;
      (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
      (iii) the fact, time and place of arrest; and
      (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

90. *Gentile*, 501 U.S. at 1048-51 (Kennedy, J., Opinion of the Court, Parts III and VI).

91. *Id.* at 1060 (Appendix to Opinion of Kennedy, J.).

92. *Id.* at 1062-63 (Rehnquist, C.J., Opinion of the Court, Parts I and II).

that of the press.[93] In fact, Rehnquist stated bluntly that the Court's "opinions in *In re Sawyer*[94] and *Sheppard v. Maxwell*[95] rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press."[96] *Gentile* promotes the "substantial likelihood of material prejudice" standard as sufficiently narrowly tailored to maintain a "constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."[97]

b. Dissension in the Ranks: No Uniform Rule Among the Circuit Courts.—In *Morrissey*, the Fourth Circuit acknowledged the Supreme Court's ruling in *Gentile*, but chose to base its decision on its own cases. Specifically, it looked to its 1974 en banc decision in *Hirschkop v. Snead*.[98]

Hirschkop involved a Virginia attorney's challenge to the constitutionality of a local rule identical to Disciplinary Rule 7-107(b) (DR 7-107(b)) of the American Bar Association's Code of Professional Responsibility.[99] The challenge was brought on grounds that the rule's application of the "reasonable likelihood" standard impermissibly restricted lawyers' speech in violation of the First and Fourteenth Amendments.[100]

The en banc *Hirschkop* court upheld the constitutionality of the "reasonable likelihood" test and found that the rule "furthered the important governmental interest of protecting both the accused's and the public's right to a fair trial."[101] In the 1984 case *In re Russell*,[102] the Fourth Circuit once again applied the "reasonable likelihood" test

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93. *Id.* at 1065-76 (comparing *Bridges v. State of California*, 314 U.S. 252 (1941), and *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976), with *In re Sawyer*, 360 U.S. 622 (1959) and *Sheppard v. Maxwell*, 384 U.S. 333 (1966)).

94. 360 U.S. 622 (1959).

95. 384 U.S. 333 (1966).

96. *Gentile*, 501 U.S. at 1074 (Rehnquist, C.J., Opinion of the Court, Parts I and II) (internal citations omitted).

97. *Id.* at 1075.

98. *See Morrissey*, 168 F.3d at 138-40 (finding that *Hirschkop* had not been overruled by *Gentile* and relying on *Hirschkop* as proper authoritative precedent).

99. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(b) (1980).

100. *See Hirschkop*, 594 F.2d at 362. As noted in *Morrissey*, Local Rule 57 is very similar to DR 7-107 in that both rules list "six specific categories of extrajudicial statements that are expressly prohibited during pending criminal trials if they are judged to be reasonably likely to materially prejudice the due administration of justice." *Morrissey*, 168 F.3d at 138; *see also supra* note 2 and accompanying text (quoting Local Rule 57).

101. *Hirschkop*, 594 F.2d at 363-64.

102. 726 F.2d 1007 (4th Cir. 1984).

and reaffirmed the *Hirschkop* reasoning.[103] More recently, in *United States v. Cutler*,[104] the Second Circuit followed the *Hirschkop* reasoning and upheld the constitutionality of a local rule identical to Local Rule 57.[105] In *Cutler*, the defense attorney for an alleged organized crime boss was convicted of misdemeanor criminal contempt for violating orders and local rules prohibiting extrajudicial statements. The court affirmed the conviction and held that Local Rule 7 of the Eastern District of New York and its "reasonable likelihood" standard adequately and constitutionally protected the fair administration of justice.

As noted earlier, some federal circuits disagree with the proposition that the "reasonable likelihood" standard is constitutional. In fact, the *Morrissey* court admitted that "the Seventh Circuit previously found the 'reasonable likelihood' standard to be unconstitutional."[106] More recently, the Ninth Circuit explained the holding in *Gentile* by stating that to satisfy the First Amendment, there must be facts showing a "substantial likelihood of material prejudice" to an adjudicative proceeding before a lawyer may be disciplined for extrajudicial comments.[107]

There is further confusion as to which rule is the constitutionally acceptable model at the state level. As noted in *Gentile*, thirty-two states have adopted the ABA's Rule 3.6 of the Model Rules of Professional Conduct[108] that employs the "substantial likelihood of material prejudice" test.[109] By contrast, eleven states have adopted the "less

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103. *Id.* at 1010-11 (upholding the trial court's order that potential witnesses in a racially charged criminal case refrain from making extrajudicial statements concerning the witnesses' potential testimony).

104. 58 F.3d 825 (2d Cir. 1995).

105. *See id.* at 835-36 (holding that E.D.N.Y. Crim. R. 7's reasonable likelihood standard is constitutional and gives due consideration to the effect defense lawyers can have on prospective jurors).

106. *Morrissey*, 168 F.3d at 138 (referring to the Seventh Circuit's decision in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 247 (7th Cir. 1975), which involved an association of Chicago lawyers and its challenge to a local criminal rule of the district court and a disciplinary rule of the American Bar Association which sought to proscribe extrajudicial comments by attorneys during both civil and criminal cases).

107. *See* United States v. Wunsch, 84 F.3d 358 (9th Cir. 1996).

108. MODEL CODE OF PROFESSIONAL CONDUCT 3.6 (Supp. 1986).

109. Gentile v. State Bar of Nevada, 501 U.S. 1039, 1068 n.1 (1991) (Rehnquist, C.J., Opinion of the Court, Parts I and II). In addition to Nevada, the states that have adopted the "substantial likelihood of material prejudice" test or a similar test are: Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

protective . . . 'reasonable likelihood of prejudice' standard."[110] Still five other states and the District of Columbia have chosen a clear and present danger standard.[111] Ironically, the Commonwealth of Virginia (as opposed to the Virginia federal district at issue in *Morrissey*) is the only state of the latter five that has explicitly adopted the clear and present danger language in its rule restricting lawyer speech.[112]

As might be expected, in *Morrissey*, the appellant viewed *Gentile* as a clarifying decision that implicitly overruled *Hirschkop* and established the "substantial likelihood of material prejudice" standard as the least restrictive test available to maintain the balance between an attorney's free speech rights and the right to the impartial administration of justice.[113] To date, *Gentile* has not had that simplifying effect.[114]

3. The Court's Reasoning.—As encouraged by *Gentile*[115] and *Bose Corp. v. Consumers Union of United States, Inc.*,[116] the Fourth Circuit in *Morrissey* reviewed the case de novo.[117] *Bose* stated that in First Amendment cases "an appellate court has an obligation 'to make an independent examination of the whole record' in order to make sure that 'the judgement does not constitute a forbidden intrusion on the field of free expression.'"[118]

The Fourth Circuit explained that Morrissey's argument was that the Supreme Court in *Gentile* implied that the less protective "reasonable likelihood" standard of Local Rule 57 was unconstitutional because the Court had found the "substantial likelihood" test to be narrowly tailored enough to pass constitutional muster.[119] The *Morrissey* court then noted, however, that it had upheld the "reasonable like-

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110. *Id.* at 1068 n.2. The states that have adopted the "reasonable likelihood of prejudice" test are the following: Alaska, Colorado, Georgia, Hawaii, Iowa, Massachusetts, Nebraska, North Carolina, Ohio, Tennessee, and Vermont. *Id.*

111. *See id.* at 1068 n.3. The states that have adopted a "clear and present danger" test or a similar test are Illinois, Maine, North Dakota, Oregon, and Virginia. *Id.*

112. Virginia is technically a commonwealth but is referred to as a state in this Note to differentiate it from the federal entities involved.

113. *See* Reply Brief of Appellant at 5, *In re* Morrissey, 168 F.2d 134 (4th Cir. 1999) (No. 98-4168).

114. *See supra* notes 109-112 (highlighting the different standards still employed by the states to control extrajudicial statements of lawyers during pending criminal proceedings).

115. *See Gentile*, 501 U.S. at 1038 (Opinion of Kennedy, J.) (stating that because First Amendment claims implicate the important right of freedom of expression, appellate courts should independently examine the entire record).

116. 466 U.S. 485, 499 (1984) (discussing the importance of a high degree of judicial review when free speech rights are involved).

117. *Morrissey*, 168 F.2d at 137.

118. *Bose*, 466 U.S. at 499 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964)).

119. *See Morrissey*, 168 F.3d at 137-38.

lihood" standard in the pre-*Gentile* case of *Hirschkop v. Snead*.[120] The court treated the appellant's claim that *Gentile* overruled *Hirschkop*, thereby rendering the "reasonable likelihood" standard unconstitutional as the threshold matter in the case.[121]

After outlining the facts in *Hirschkop*, the court reasoned that Local Rule 57 and the rule in *Hirschkop* are "very similar" in that they both enumerate six specific categories of extrajudicial statements that are expressly prohibited during pending litigation.[122] The court again pointed to the six specific categories of the rule at issue in *Hirschkop* as proof that it "was narrowly drawn and provided attorneys with sufficient notice of what they could and could not publicize."[123]

The *Morrissey* court also recalled its explicit rejection of the Seventh Circuit's dismissal of the "reasonable likelihood" standard as unconstitutional and restated that "[i]n our opinion, 'the reasonable likelihood test divides the innocuous from the culpable, adds clarity to the rule and makes it more definite in application.'"[124] Finally, the court noted that it had reaffirmed *Hirschkop* in *In re Russell*,[125] a case in which the "reasonable likelihood" test was applied to a court order in considering its constitutionality.[126]

The *Morrissey* court then discussed the Supreme Court's reasoning in *Gentile* and whether the *Hirschkop* decision was silently overruled. The court first reiterated Chief Justice Rehnquist's opinion in *Gentile* that "few, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."[127] The court also mentioned the Chief Justice's assertion in *Gentile* that improper extrajudicial statements result in a high cost to society including the need for new trials, changes in venue, and other "expensive and time consuming measures."[128]

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120. *See id.* at 138 (citing Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) (per curiam)).

121. *Id.*

122. *Id.*

123. *Id.* (citing *Hirschkop*, 594 F.2d at 367-68).

124. *Id.* at 138-39 (quoting *Hirschkop*, 594 F.2d at 370).

125. 726 F.3d 1007, 1010-11 (4th Cir. 1984).

126. *See Morrissey*, 168 F.3d at 139 (discussing further the court's past reliance on the *Hirschkop* holding).

127. *Id.* (internal quotation marks omitted) (quoting Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991)).

128. *Id.* (citing *Gentile*, 501 U.S. at 1075 (Rehnquist, C.J., Opinion of the Court, Parts I and II)) (noting that even these measures often do not repair the damage of extrajudicial statements).

The Fourth Circuit then summarized *Gentile*'s holding, but cautioned that the Supreme Court did not hold that "substantial likelihood" was the only permissible standard.[129] The court also noted the *Gentile* Court's recognition that there are "different standards, including the existence of the 'reasonable likelihood' standard in place in eleven states"[130] and the Court's comment that the "'reasonable likelihood' standard is 'less protective of lawyer speech.'"[131] The *Morrissey* court pointed out, however, that these comments came from *Gentile* dicta and that the Court did not attempt to examine the constitutionality of other tests.[132]

The court then noted the Second Circuit's *United States v. Cutler* decision,[133] a case in which the Second Circuit followed the Fourth Circuit's reasoning in *Hirschkop* and "upheld the constitutionality of a local rule identical to Local Rule 57."[134] The *Morrissey* court also acknowledged that the *Cutler* court cited *Gentile* "throughout its decision . . . [without] discuss[ing] the Supreme Court's mention of the 'reasonable likelihood' standard as less protective of lawyer speech."[135] Ultimately, the court found itself in agreement with the Second Circuit's reasoning in *Cutler* and held that "*Gentile* and *Hirschkop* are consistent with one other."[136] The *Morrissey* court also refused to accept the appellant's argument that *Gentile* overruled the holding in *Hirschkop* and instead reasoned that "arguing . . . a precedent has been overruled through a court's silence is a disfavored enterprise within this circuit."[137]

Next, the court stated that Local Rule 57's "reasonable likelihood" standard "is sufficiently narrowly tailored to pass constitutional muster."[138] It applied the two-prong test of *Procunier v. Martinez*, namely, whether the content-based speech restriction (1) "further[s] an important or substantial government interest" and (2) is "no greater than necessary or essential to protect the governmental interest involved."[139] The court noted that the "real question" is whether the second prong is satisfied because courts have agreed that protect-

129. *Id.* (rejecting Morrissey's contention to the contrary).
130. *Id.* (referring to *Gentile*, 501 U.S. at 1068).
131. *Id.* (quoting *Gentile*, 501 U.S. at 1068).
132. *Id.*
133. 58 F.3d 825 (2d Cir. 1995).
134. *Morrissey*, 168 F.3d at 139.
135. *Id.*
136. *Id.*
137. *Id.* at 139-40.
138. *Id.* at 140.
139. *Id.* (internal quotation marks omitted) (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)); *see also supra* notes 83-85 and accompanying text.

ing the right to a fair criminal trial by an impartial jury is an important state interest.[140] The court found that Local Rule 57 does satisfy the second prong in that "it prohibits only the statements that are likely to threaten the right to a fair trial and an impartial jury" and "explicitly lists six limited categories of prohibited speech."[141]

Finally, the *Morrissey* court supported its holding that "*Gentile* and *Hirschkop* are consistent with each other"[142] by showing that Local Rule 57 satisfied *Gentile*'s requirements for limitations on lawyer speech. In doing so, the court first asserted that Local Rule 57's limitations of lawyer speech, like the rule in *Gentile*, are "aimed at the two evils that threaten the integrity of the judicial system . . . (1) comments that will likely influence the outcome of the trial and (2) statements that will prejudice the jury venire even if an untainted jury panel can be found."[143]

Next, the court reasoned that Local Rule 57 makes no distinctions based on viewpoint and does not prohibit speech beyond the length of the trial.[144] Consequently, the "reasonable likelihood" standard of the local rule was viewed to be sufficiently narrowly tailored, as generally "satisf[ying] each of the elements required for constitutionally adequate protection, and [thereby] . . . not impermissibly infr-ing[ing] on a lawyer's First Amendment rights."[145] The Fourth Circuit therefore affirmed the district court's ruling that Local Rule 57 was constitutionally valid on its face and as applied to Morrissey.[146]

4. Analysis.—

a. Mistake in Logic or Semantic Nonsense?—Perhaps the threshold question of the *Morrissey* analysis is an obvious one: If the Supreme Court held in *Gentile* that the "substantial likelihood of material prejudice" standard is narrowly tailored and *no greater than necessary* to protect the governmental interest involved,[147] how can the "reasonable likelihood" standard, which the Court said is "less protective," also be constitutionally valid?

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140. *Morrissey*, 168 F.2d at 140 (citing Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966); Hirschkop v. Snead, 594 F.2d. 356, 363 (4th Cir. 1979) (per curiam)).

141. *Id.* The court stated that these six categories "represent only the statements that the Supreme Court established in *Sheppard* as most likely to cause prejudice in adjudicative proceedings." *Id.* (citing *Sheppard*, 384 U.S. at 361-62).

142. *Id.* at 139.

143. *Id.* at 140 (citing *Gentile*, 501 U.S. at 1075).

144. *Id.*

145. *Id.*

146. *Id.* at 141.

147. *See Gentile*, 501 U.S. at 1075-76.

The logical answer is that if the two-prong, "no greater than necessary" *Martinez* test[148] is applied (as is done in both *Gentile* and *Morrissey*), it cannot. As plainly stated by the appellant Morrissey, if "the 'substantial likelihood of material prejudice' standard is narrowly tailored and no broader than necessary, the *less protective standard* of 'reasonable likelihood of prejudice' cannot *also* be narrowly tailored and no broader than necessary."[149] Although Justice Frankfurter's admonition about semantic gymnastics and "an idle play on words" is well taken,[150] "substantial" is legally more demanding than "reasonable" while "material prejudice" is more exacting than "prejudice."[151]

The Supreme Court recently offered more evidence that lawyer speech should be given considerable respect and protection when it stated that "speech by attorneys on public issues and matters of legal representation [is afforded] the strongest protection our Constitution has to offer."[152] The counterargument would be that an attorney is still free to say what she pleases, just not during the trial. This reasoning, however, does not give ample attention to the importance of timing. As Justice Black noted in *Bridges v. State of California*:

> [A]s a practical result [of restricting an attorney's speech during the pendency of a case] . . . anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as ef-

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148. *See supra* note 85 and accompanying text (describing the *Martinez* test as requiring a substantial governmental interest and a restriction on speech as least intrusive as possible to attain the governmental interest).

149. Appellant's Brief at 6-7, *Morrissey* (No. 98-4168) (describing appellant's position that the two standards at issue are logically inconsistent with each other).

150. Bridges v. State of California, 314 U.S. 252, 295 (Frankfurter, J., dissenting) (stating a concern that the parsing of language occurring in the decision was leading to results not in conformity with the history of similar decisions).

151. Of course, the word "material," defined as "relevant to the matter at hand," BLACK'S LAW DICTIONARY 976 (6th ed. 1990) is significant in many areas of law. For example, elementary contract law dictates that a transaction is voidable if the seller fails to disclose a *material* fact that a reasonable person would weigh and consider before making the purchase. *See* CALAMARI AND PERILLO, THE LAW OF CONTRACTS 53-55 (4th ed. 1998). Nondisclosure of just any fact will not suffice.

Using the same logic in the context of restrictions on lawyer speech, extrajudicial comments that *materially* prejudice a person's right to a fair trial are actionable whereas comments that would not affect the outcome of a trial need not be suppressed. In other words, the word "material" properly narrows the standard and provides an attorney with more substantive notice of speech that is not acceptable.

152. Florida Bar v. Went For It, Inc., 515 U.S. 618, 634 (1995) (stating that such protection should be afforded to lawyers in appropriate circumstances).

> fectively discouraged as if a deliberate statutory scheme of censorship had been adopted.[153]

Although *Bridges* primarily concerned free speech of the press, a statutory scheme of censorship that unduly chills lawyer speech during a pending case is equally unacceptable, particularly when the attorney's comments will not materially prejudice the trial, but, rather, may shed light on public issues involved.

The *Morrissey* opinion itself has further shortcomings. Most notably, the court claimed that overruling a precedent through a court's silence is "a disfavored enterprise within this circuit."[154] Ironically, the court lists not one case to support that contention. Furthermore, the court acknowledged the Supreme Court's view that the "reasonable likelihood" standard is "less protective of lawyer speech" but refused to take the next step by applying that reasoning to the constitutionality of Local Rule 57.[155] It is as if the court knew that two minus one equals one, but refused to say so until the Supreme Court informed them that one, in fact, is the answer.

Finally, it is disconcerting that courts and states cannot agree on an issue that concerns free speech rights for millions of attorneys in the United States. As previously noted, the states (and federal circuits, for that matter) are inconsistent, at best, as to their view on the proper standard to control lawyer speech.[156] By changing to the "substantial likelihood" standard, the small minority of states that still have the "reasonable likelihood" standard[157] could maintain a proper balance between a lawyer's free speech rights and the right to impartial justice, while bringing much needed clarity and uniformity to the rule. Ironically enough, the actions of Morrissey would also have been in violation of the "substantial likelihood of material prejudice" standard and punished accordingly.[158] Perhaps a lawyer who is held in criminal contempt for less egregious speech and activity would force the Fourth Circuit to reconsider its position.

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153. *Bridges*, 314 U.S. at 269 (discussing the importance of the press' ability to comment on public issues in a timely manner).

154. *Morrissey*, 168 F.3d 134, 139-40 (preferring a clear intent stated by the court that a particular standard be overruled).

155. *Id.* at 139.

156. *See supra* notes 109-111 and accompanying text (referring to *Gentile* footnotes that list the various standards restricting lawyer speech and the states that have adopted them).

157. *See supra* note 110 and accompanying text (explaining that there are eleven states that have adopted such a standard).

158. *See Morrissey*, 168 F.3d at 140 (describing the ways in which Morrissey's comments would have a significant effect on the outcome of the trial); *see also* Appellee's Brief at 15, *Morrissey* (No. 98-4168) (referring to Judge Payne's alternative holding that Morrissey's actions also satisfied the "substantial likelihood of material prejudice" test).

b. The Bigger Picture: Avoiding Kangaroo Courts.—A broader reason for overruling the "reasonable likelihood" standard in favor of the less restrictive "substantial likelihood of material prejudice" test is the public's right to examine and criticize the government and its officials. Lawyers play an important role in guaranteeing that right because of their skill and knowledge of civic matters and because of the legal processes involved.[159] Lawyers, advocates and counsel for their clients are usually the only ones to speak on behalf of their clients during pending litigation. Consequently, the voice of an attorney may be the only voice the accused party has during the pending criminal litigation.

The cases from which the *Morrissey* and *Gentile* convictions evolved involved criminal indictments with political overtones. Morrissey's client was a political operative and suspected homosexual charged with drug distribution violations.[160] Gentile's client was a storage vault owner accused of stealing a customer's money, even though two local police officers had unlimited access to the deposit boxes in question.[161] In each scenario, the accused's attorney had a legitimate right to point out glaring and important facts of the case that went to the motives of the prosecution. In other words, Morrissey attempted to show that his client was being unfairly targeted because of his political ties, while Gentile tried to demonstrate that his client was a scapegoat for crooked cops.

As stated by Justice Kennedy in *Gentile*, "[a]t issue here is the constitutionality of a ban on political speech critical of the government and its officials."[162] Political speech "has traditionally been recognized as lying at the core of the First Amendment."[163] Consequently, a lesser standard that would allow for greater suppression of lawyer speech at the exact time when limitations are most repugnant to the Constitution, is simply unacceptable.

The danger that may follow from a lesser standard is a government or judiciary that wields subjectively interpreted powers to silence lawyers who criticize what may be a potential railroading of their clients. As Justice Black warned: "[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would

159. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1056-57 (1991) (plurality opinion) (Opinion of Kennedy, J.) (discussing the important function lawyers perform in informing the general public of issues relevant to the judicial system).

160. *See* Appellant's Brief at 6, *Morrissey* (No. 98-4168).

161. *See Gentile*, 501 U.S. at 1039-41 (Opinion of Kennedy, J.).

162. *Id.* at 1034.

163. *Id.* at 1035 (quoting Butterworth v. Smith, 494 U.S. 624, 632 (1990)).

probably engender resentment, suspicion, and contempt much more than it would enhance respect."[164] Fairness of trials is also of paramount concern.[165] A "liberty-loving society"[166] cannot permit such mandated silence when its enforcement is based on uncertain rules and arbitrary targets.

Although most would agree that "legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper,"[167] it is important in an information age for a society to be informed as to how and why justice is being administered, especially in situations where there appears to be an overzealous prosecution. Sad would be the day when a person is wrongfully or maliciously prosecuted on questionable charges and his counsel may not comment due to fear of reprisal. This result would sway American confidence in the justice system and promote charges of selective "kangaroo courts."[168] The "substantial likelihood of material prejudice" standard allows an attorney to speak more freely on behalf of his client than the less protective "reasonable likelihood" standard, thus giving citizens more confidence in the integrity of trials and in the judicial system as a whole. Although the difference in the standards may seem slight to some, courts have always been leery of the "slippery slope," especially when it pertains to First Amendment rights.

5. Conclusion.—Although upheld in *In re Morrissey*, the "reasonable likelihood of prejudice" standard is less protective of a lawyer's First Amendments rights and increases the likelihood of contempt charges for unwary attorneys. Only eleven states maintain this standard, and there is explicit disagreement among the federal courts as to its constitutionality.

The Supreme Court's adoption of the "substantial likelihood of material prejudice" standard as the only constitutionally viable rule would mandate a unified standard nationwide while maintaining the delicate balance between free speech rights and the right to fair trials. Furthermore, attorneys would have better notice as to the type of comments they are permitted, and not permitted, to make during pending litigation.

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164. Bridges v. California, 314 U.S. 252, 270-71 (1941).

165. *See supra* text accompanying notes 96-97.

166. *Bridges*, 314 U.S. at 263.

167. *Id.* at 271.

168. Kangaroo courts are defined as "[s]purious legal proceedings; proceeding where a person's rights and liberties are ignored and the result is a foregone conclusion." BLACK'S LAW DICTIONARY 868 (6th ed. 1990).

Morrissey probably would have been convicted under either standard. The Fourth Circuit, however, had the opportunity to reject the "reasonable likelihood" standard. The Supreme Court's *Gentile* decision cleared the way for the Fourth Circuit to overrule its ruling in *Hirschkop*—the twenty-five-year-old decision that upheld the constitutionality of the "reasonable likelihood" standard. The Fourth Circuit refused to do so.

As a result, a constitutional showdown between the two tests is imminent. This battle of standards has created confusion for lawyers as to what they can and cannot say. Until that showdown, a watchful eye must be cast upon "reasonable likelihood" jurisdictions to ensure that contempt punishments are not handed down arbitrarily or with politically suspicious overtones.

JASON P. BEAULIEU

III. EMPLOYMENT LAW

A. *Concluding that At-Will Employment Suffices as a Contractual Relationship*

In *Spriggs v. Diamond Auto Glass*,[1] the Fourth Circuit considered whether at-will employment relationships were "contracts" entitled to the protection of 42 U.S.C. § 1981.[2] Section 1981 guarantees that all people have equal rights to make and to enforce contracts.[3] The court held that although at-will employment relationships were terminable at the will of either the employer or the employee, they are nonetheless contracts within the meaning of § 1981.[4] In so doing, the Fourth Circuit followed the decision of the only other circuit to consider the issue squarely.[5] The Fourth Circuit rejected notions that such employment relations either did not give rise to contracts or that the very fact that an employer could terminate the employee for no reason meant that it could also do so for a racially discriminatory reason.[6] The solid legal analysis employed by the court in *Spriggs* helps to further solidify the precedent of enforcing at-will contractual rights under § 1981.

1. The Case.—James H. Spriggs, an African-American, began working for Diamond Auto Glass (Diamond) in July 1993 as a customer service representative.[7] No formal written employment contract existed, and Diamond apparently never promised a specific duration of employment.[8] His supervisor, Stickell, who was white, had

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1. 165 F.3d 1015 (4th Cir. 1999).

2. *See id.* at 1016-17. Section 1981 provides, in full:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (1994).

3. *Id.* § 1981(a).

4. *See Spriggs*, 165 F.3d at 1018-19.

5. *See id.* at 1019 (citing Fadeyi v. Planned Parenthood Ass'n, 160 F.3d 1048 (5th Cir. 1998)).

6. *Id.* at 1019-20.

7. *See id.* at 1016.

8. *See id.* at 1017.

repeatedly used racial slurs in Spriggs's presence and sometimes directed these remarks at Spriggs.[9] Spriggs quit in August 1995, but he later returned to work in September 1996 after a manager promised to do his best to control Stickell.[10] Nevertheless, Stickell persisted in his racist comments and actions, and Spriggs quit again on February 6, 1997.[11] Spriggs returned to work for the last time on March 10, 1997, again at the request of a manager.[12] Stickell immediately gave him new duties that Spriggs considered to be "unreasonable and racially motivated."[13] Shortly after his return, Spriggs left the company permanently and filed suit under 42 U.S.C. § 1981.[14]

In October 1997, the United States District Court for the District of Maryland determined that under Maryland law, Spriggs was an at-will employee and reasoned that because "an at-will employment contract confers no rights that are enforceable in an action ex contractu, . . . [it] cannot serve as the predicate for a Section 1981 action."[15] Accordingly, the district court dismissed Spriggs's § 1981 claim.[16] Spriggs responded with a motion for reconsideration that was denied by the district court.[17] He then appealed the dismissal of the action.

2. *Legal Background.*—

a. Section 1981 before the Civil Rights Act of 1991.—Congress enacted 42 U.S.C. § 1981 to guarantee that all people in the United States were granted the same rights as white citizens with respect "to mak[ing] and enforc[ing] contracts," as well as guaranteeing other rights.[18] Originally, § 1981 consisted solely of the current subsection (a), with no further explanations or qualifications attached.[19] At the

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9. *See id.*; *see also id.* n.2 (giving examples of some of the offensive racial remarks made in Spriggs's presence).

10. *See id.* at 1017.

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

15. Spriggs v. Diamond Auto Glass, No. S 97-1449, 1997 U.S. Dist. LEXIS 22476, at *2 (D. Md. Oct. 15, 1997) (granting the defendant's motion to dismiss).

16. *Id.*

17. Spriggs v. Diamond Auto Glass, No. S 97-1449, 1997 U.S. Dist. LEXIS 22475, at *1 (D. Md. Oct. 27, 1997) (denying the motion for reconsideration). In his decision to deny reconsideration, Judge Smalkin stated that "[w]hile an at-will employment contract may support an action for wages earned but not paid, this is essentially a quasi-contractual remedy in the nature of quantum meruit, not a contract remedy seeking to enforce any right of continued employment." *Id.* at *1.

18. 42 U.S.C. § 1981(a); *see also supra* note 2 (quoting § 1981(a) in its entirety).

19. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (amending § 1981 by inserting (a) before "All persons within" and adding subsections (b) and (c)).

time, the Supreme Court interpreted § 1981's "make and enforce contracts" provision narrowly.

In *Patterson v. McLean Credit Union*,[20] the Supreme Court held that "racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations."[21] The Court was very clear in stating that § 1981 could not "be construed as a general proscription of racial discrimination in all aspects of contract relations," reasoning that § 1981 expressly prohibited discrimination only in the making and in the enforcement of contracts.[22] Such a narrow interpretation would be short lived, as Congress would soon enact the Civil Rights Act of 1991 specifically to overturn *Patterson*.[23]

The Seventh Circuit discussed the issue further, in dicta, in *McKnight v. General Motors Corp.*[24] In *McKnight*, the court did not expressly decide whether at-will employment relationships meet the contractual requirement of § 1981. The court, however, did provide a relatively substantial analysis of contracts for at-will employment.[25] The court stated that "[e]mployment at will is not a state of nature but a continuing contractual relation."[26] The court also noted that "[a] contract for employment at will may end abruptly but it is a real and continuing contract nonetheless, not a series of contracts each a day—or a minute—long."[27] These statements suggest that the Seventh Circuit would support the conclusion that at-will employment relationships are, in fact, contracts under § 1981.[28]

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20. 491 U.S. 164 (1989).

21. *Id.* at 171. McLean Credit Union hired Patterson as a teller in May 1972. *See id.* at 169. She was fired in July 1982. *See id.* Patterson sued under § 1981 alleging harassment and racial discrimination. *See id.*

22. *Id.* at 176 (interpreting § 1981 as not protecting "problems that may arise later from the conditions of continuing employment").

23. *See* H.R. REP. NO. 102-40, pt. 2, at 35 (1991) (noting that subsection (b) was intended to overturn *Patterson*).

24. 908 F.2d 104, 108-12 (7th Cir. 1990). McKnight brought suit under § 1981 "claiming that General Motors fired him both because he is black and also in retaliation for his having filed claims of racial discrimination against the company." *Id.* at 107.

25. *Id.* at 109.

26. *Id.*

27. *Id.*

28. It is significant to note that *McKnight* was decided in 1990, before the enactment of the Civil Rights Act of 1991. Because the case was decided in the time of *Patterson*, and prior to the 1991 Act, the Seventh Circuit has since questioned its validity. *See* Gonzalez v. Ingersoll Milling Mach. Co., 133 F.3d 1025, 1035 (7th Cir. 1998) ("Although dicta in *McKnight* suggests that an employment-at-will situation might support section 1981 claims, its

b. The Civil Rights Act of 1991 and the Broadening of the "Make and Enforce Contracts" Provision.—In the House Report discussing the purpose of the Civil Rights Act of 1991, the committee observed that "[t]he impact of *Patterson* has been disastrous."[29] In response, Congress added two subsections to § 1981.[30] Section 1981(b) defines the "make and enforce contracts" phrase and was added as a direct response to the limitations of *Patterson*, specifically the restrictions on when § 1981 could be applied.[31] In the House Report, Congress expressly stated that subsection (b) overrules *Patterson*.[32] Subsection (c) was added to ensure that § 1981 applied to private contracts, as well as to public ones.[33] Therefore, after the Act's enactment in 1991, the issue of forced termination due to discrimination could arise because conduct, after the making of a contract, was suddenly subject to proscription. There would seem to be little to no debate over the effect of amending § 1981 since Congress expressed clearly its intention to expand its scope of proscription, which had been strictly limited by the Supreme Court in *Patterson*. After the 1991 Act, a large number of district court cases began to address the issue of whether at-will employment relationships were contracts under § 1981.[34] Until *Spriggs* in 1999, however, only one circuit court had addressed the issue head on.[35]

In 1998, the Fifth Circuit in *Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc.*[36] became the first circuit to decide this issue. Fadeyi argued that her termination was actionable under § 1981, despite the

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validity today is questionable given that case's reliance upon *Patterson*."). Various cases, however, cite *McKnight* for the proposition that at-will relationships amount to contracts under § 1981. *See, e.g., Gonzalez*, 133 F.3d at 1034-35 (questioning the validity of this proposition); Gandy v. Gateway Found., No. 97 C 2286, 1999 WL 102777, at *17-18 (N.D. Ill. Feb. 22, 1999) (noting that according to *McKnight*, "at least under Illinois law, an at-will relationship would be sufficient to support a section 1981 claim attacking a demotion and reduction in pay"); Curtis v. Dimaio, 46 F. Supp. 2d 206, 212 (E.D.N.Y. 1999) (discussing the holding of *McKnight*).

29. H.R. REP. NO. 102-40, pt. 2, at 36 (1991).

30. *Id.* at 37.

31. *See id.*; *see also supra* note 2. Specifically, the report states that subsection (b) bars "all racial discrimination in contracts" including, but not limited to "claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring." *Id.*

32. H.R. REP. NO. 102-40, pt. 2, at 36.

33. *Id.* Subsection (c) was intended to codify the holding of the Supreme Court case of *Runyon v. McCrary*, 427 U.S. 160 (1976), which, according to the report, "prohibited intentional racial discrimination in private, as well as public, contracting." *Id.*

34. *See infra* notes 41-42.

35. *See infra* notes 36-40 and accompanying text.

36. 160 F.3d 1048 (5th Cir. 1998).

fact that she was an at-will employee.[37] The court explained that "to hold that at-will employees have no right of action under § 1981 would effectively eviscerate the very protection that Congress expressly intended to install for minority employees."[38] Although the Fifth Circuit had previously decided that an at-will employment relationship is a contractual one, the decision was not in relation to a claim under § 1981.[39] The court noted that although over forty states recognized that § 1981 claims could be brought for at-will employment relationships, case law on the issue prior to that time had been "surprisingly sparse."[40]

Since *Fadeyi*, many district court cases have addressed this issue. The majority of those cases have reached the same conclusion as the Fifth Circuit. These cases have all concluded that at-will employment relationships satisfy the contractual requirement of § 1981(b).[41] Courts in at least five separate districts, however, have rejected the argument that an at-will employment relationship meets the contractual requirement of § 1981(b).[42]

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37. *See id.* at 1048. Fadeyi, a black female, was employed by Planned Parenthood. *See id.* During her employment, she made various racial discrimination complaints. *See id.* Planned Parenthood fired her "two working days after receiving notification that the EEOC did not have jurisdiction to entertain her complaints." *Id.*

38. *Id.* at 1050.

39. *See* Paniagua v. City of Galveston, 995 F.2d 1310, 1313 (5th Cir. 1993) (per curiam) (noting that "even assuming that Paniagua had only an at-will employment contract, he nonetheless had a *contract* with the City of Galveston").

40. *Fadeyi*, 160 F.3d at 1049.

41. Many district courts have accepted that an at-will employment relationship is sufficient to satisfy the contractual requirement of § 1981(b). Price v. Wisconsin Servs. Corp., 55 F. Supp. 2d 952, 955-56 (E.D. Wis. 1999); Robinson v. SABIS Educ. Sys., No. 98 C 4251, 1999 U.S. Dist. LEXIS 9065, at *2 (N.D. Ill. June 3, 1999); Jones v. SABIS Educ. Sys., Inc., 52 F. Supp. 2d 868, 875-76 (N.D. Ill. 1999); Lazaro v. Good Samaritan Hosp., 54 F. Supp. 2d 180, 185 (S.D.N.Y. 1999); LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 776 (D. Neb. 1999); O'Neal v. Ferguson Constr. Co., 35 F. Supp. 2d 832, 837-38 (D.N.M. 1999); Byers v. Dallas Morning News, Inc., No. 3:97-CV-1159-R, 1999 U.S. Dist. LEXIS 233, at *15-16 (N.D. Tex. Jan. 7, 1999); Williams v. United Dairy Farmers, 20 F. Supp. 2d 1193, 1202 (S.D. Ohio 1998); Lane v. Ogden Entertainment, Inc., 13 F. Supp. 2d 1261, 1272 (M.D. Ala. 1998); Larmore v. RCP/JAS, Inc., No. CIV. A. 97-5330, 1998 WL 372647, at *3 (E.D. Pa. May 19, 1998); Baker v. American Juice, Inc., 870 F. Supp. 878 (N.D. Ind. 1994); Harris v. New York Times, No. 90 CIV. 5235 (CSH), 1993 WL 42773, at *3 (S.D.N.Y. Feb. 11, 1993).

42. *See, e.g.*, Jones v. Becker Group of O'Fallon Div., 38 F. Supp. 2d 793, 795-97 (E.D. Mo. 1999); Payne v. Abbott Lab., No. 97 C 3882, 1999 U.S. Dist. LEXIS 2443, at *6-7 (N.D. Ill. Mar. 2, 1999); Bascomb v. Smith Barney Inc., No. 96 CIV. 8747 (LAP), 1999 WL 20853, at *4 (S.D.N.Y. Jan. 15, 1999); Hawkins v. Pepsico, Inc., 10 F. Supp. 2d 548, 553-54 (M.D.N.C. 1998); Simpson v. Vacco, No. 96 CIV. 3916 (JFK), 1998 WL 118155, at *8 (S.D.N.Y. Mar. 17, 1998); Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665, 667, 675-76 (E.D.N.Y. 1997); Moscowitz v. Brown, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994);

The reasoning of those district court cases that have rejected § 1981 claims by at-will employees is contained within the analyses of two or three of the leading cases. *Moorer v. Grumman Aerospace Corp.*[43] is perhaps most commonly cited as support for concluding that at-will relationships are not contracts under § 1981(b).[44] In *Moorer*, the United States District Court for the Eastern District of New York agreed with the defendant-employer's argument that the plaintiff-employee's at-will employment relationship was not a contract sufficient to support a § 1981 claim.[45] Also commonly cited is *Moscowitz v. Brown*,[46] in which a New York district court concluded that no underlying contractual relationship had been alleged, as the plaintiff was merely an at-will employee.[47] A slightly different analysis was used by the court in *Askew v. May Merchandising Corp.*,[48] which is also frequently cited. The court in *Askew* concluded that the plaintiff's employment was not contractual in nature and was, therefore, fatal to his § 1981 claim.[49] The court predicted that all of New York's courts would interpret the plaintiff's employment as being at-will, not as a contract of employment.[50] *Askew*, *Moorer*, and *Moscowitz* are all perfect examples of the basic argument made by these courts: no underlying contract exists in an at-will employment relationship. This statement has often been the basis of the analysis given by the courts, as no further explanations are provided.

While the arguments regarding the issue have been scarce within the district court cases, one Seventh Circuit case has discussed the issue in greater detail. In *Gonzalez v. Ingersoll Milling Machine Co.*,[51] the court devoted a substantial portion of its opinion, albeit dicta, to an analysis of at-will contracts.[52] The court questioned the validity of Judge Posner's earlier opinion in *McKnight*,[53] in which Judge Posner claimed that the at-will employment "contract" covered "[w]ages, benefits, duties, [and] working conditions," but not the term of employ-

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Askew v. May Merchandising Corp., No. 87 CIV. 7835 (JFK), 1991 WL 24390, at *5-6 (S.D.N.Y. Feb. 20, 1991).

43. 964 F. Supp. 665 (E.D.N.Y. 1997).

44. *See, e.g.*, *Fadeyi*, 160 F.2d at 1049 n.11; *Lane*, 13 F. Supp. 2d at 1272.

45. *Moorer*, 964 F. Supp. at 667, 675-76.

46. 850 F. Supp. 1185 (S.D.N.Y. 1994).

47. *Id.* at 1192.

48. No. 87 CIV. 7835 (JFK), 1991 WL 24390 (S.D.N.Y. Feb. 20, 1991).

49. *Id.* at *6.

50. *Id.* at *5.

51. 133 F.3d 1025 (7th Cir. 1998).

52. *See id.* at 1034-35.

53. McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990).

ment.[54] Whereas *McKnight* had hinted that if it had decided the issue, it would have allowed § 1981 claims to be brought by at-will employees,[55] *Gonzalez* could be interpreted as supporting the opposite position in light of the court's statement that, as an at-will employee, Gonzalez did not have any contractual rights to continued employment, and thus could not claim that she was discriminated against with respect to being fired.[56] Thus, the court's dicta supported both sides of the issue as is exemplified in *McKnight* prior to the Act of 1991 and then later by *Gonzalez* after the adoption of the Act of 1991.

3. The Court's Reasoning.—In *Spriggs*, the Fourth Circuit began its analysis by examining the history of § 1981 claims and discussing the changes made by the Civil Rights Act of 1991.[57] After observing that § 1981(a) guarantees to all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," the court noted that the Supreme Court had construed the statute narrowly before the 1991 amendments.[58] The court then discussed the broadening effects of the Civil Rights Act of 1991.[59] The discussion was brief, as the court quoted § 1981(b) and mentioned its new, broad definition of make and enforce contracts.[60]

The court then considered whether Spriggs's complaint alleged facts that, if true, would show that he had a contract with Diamond.[61] The court concluded that it did.[62] The court reasoned that Diamond offered to pay Spriggs for acting as a customer service representative, which he then accepted by working for them.[63] The performance of such duties was the consideration necessary to complete the contract equation.[64] Therefore, because all of the elements of a contract ex-

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54. *Gonzalez*, 133 F.3d at 1035 (citing *McKnight*, 908 F.3d at 109).

55. *See supra* notes 24-28 and accompanying text.

56. *Gonzalez*, 133 F.3d at 1035.

57. 165 F.3d at 1017-18.

58. *Id.* at 1017 (internal quotation marks omitted) (alteration in original) (quoting 42 U.S.C. § 1981(a)).

59. *Id.* at 1018; *see supra* notes 31-33 and accompanying text (discussing Congress's enactment of § 1981(b) and (c) to broaden the scope of proscription).

60. 165 F.3d at 1017-18 (noting Congress's response to *Patterson* by amending § 1981 "by adding, *inter alia*, a new, broad definition of 'make and enforce contracts'").

61. *Id.* at 1018.

62. *Id.*

63. *Id.*

64. *See id.* ("Spriggs's performance of the assigned job duties was consideration exchanged for Diamond's promise to pay. The parties' actions thus created a contractual relationship." (citing Williams v. United Dairy Farmers, 20 F. Supp. 2d 1193, 1202 (S.D. Ohio 1998))).

isted, the court held that a contract had been formed between Spriggs and Diamond.[65]

The court discussed Maryland law and commented that the lack of an agreed upon duration in at-will employment relationships does not mean that they are not contracts.[66] Under Maryland law, the absence of an agreed upon duration of employment allows either party to terminate the contract at will.[67] Furthermore, the court noted that Maryland courts have recognized that at-will employment relationships are contracts.[68] The court then concluded that Spriggs's employment relationship with Diamond, though terminable at will, was nonetheless contractual.[69]

The court then returned to the topic of § 1981 and the subsequent amendments in the 1991 Act, stating briefly that it had seen no indication that Congress intended "the term 'contract' to have any meaning other than its ordinary one" when it drafted the original § 1981 or when it amended the statute in 1991.[70] Having concluded that an at-will employment relationship was contractual, the court found "that such relationships may therefore serve as predicate contracts for § 1981 claims."[71]

The court then discussed the only circuit court case to have squarely addressed this issue, *Fadeyi v. Planned Parenthood Ass'n of Lubbock, Inc.*[72] The court stated that it agreed with the Fifth Circuit's conclusion in *Fadeyi*.[73] The court then provided a brief overview of the reasoning in *Fadeyi*, noting that the Fifth Circuit, after reviewing *Patterson* and § 1981's text and history, had concluded that "Congress could not have meant to exclude at-will workers from the reach of § 1981

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65. *Id.*

66. *Id.*

67. *See id.* (citing Adler v. American Standard Corp., 291 Md. 31, 35, 432 A.2d 464, 467 (1981)).

68. *Id.* ("In Maryland, at-will employment is a contract of indefinite duration that can be terminated at the pleasure of either party at any time." (quoting Hrehorovich v. Harbor Hosp. Ctr., 93 Md. App. 772, 790, 614 A.2d 1021, 1030 (1992))).

69. *Id.* (citing McKnight v. General Motors Corp., 908 F.2d 104, 109 (7th Cir. 1990)). The court indicated, in a footnote, that the Seventh Circuit recently questioned *McKnight* in dicta in *Gonzalez v. Ingersoll Milling Machine Co.*, 133 F.3d 1025, 1035 (7th Cir. 1998), but concluded that the *McKnight* court's analysis of the basic at-will employment relationship was persuasive whether or not the case was still good law. *Id.* at 1018 n.5.

70. *Id.* (citing Lane v. Ogden Entertainment, Inc., 13 F. Supp. 2d 1261, 1272 (M.N. Ala. 1998)).

71. *Id.* at 1018-19.

72. *Id.* at 1019 (discussing *Fadeyi*, 160 F.3d 1048 (5th Cir. 1998)); *see also supra* notes 36-40 and accompanying text (discussing *Fadeyi*); *infra* notes 97-114 (discussing the decision on *Fadeyi* more fully).

73. *Spriggs*, 165 F.3d at 1019.

. . . ."[74] In summing up its discussion of *Fadeyi*, the court stated that its decision was consistent with the holding of the Fifth Circuit, the only other federal circuit court to have decided the issue.[75]

After deciding the issue, the court clarified its previous decision in *Conkwright v. Westinghouse Electric Corp.*[76] The court declared that the district court had misapplied *Conkwright* in its rejection of Spriggs's § 1981 claim.[77] The court noted that in *Conkwright*, it had found that, under Maryland law, the terms of an employee manual had not become part of the plaintiff's employment contract.[78] Accordingly, the *Conkwright* plaintiff was "purely an at-will employee."[79] The *Spriggs* court explained that the Fourth Circuit "did not hold [in *Conkwright*] that contracts terminable at will do not create enforceable contract rights," and that they did, in fact, create such rights.[80]

After distinguishing its precise holding in *Conkwright*, the court turned its attention to *Moorer v. Grumman Aerospace Corp.*,[81] the other case that the district court cited in making its determination that at-will employment relationships are not adequate to bring a claim under § 1981.[82] The Fourth Circuit described *Moorer* as "one of a handful of district court cases holding that at-will employment contracts cannot serve as predicates for § 1981 claims."[83] Additionally, the court noted that the Seventh Circuit in *Gonzalez*,[84] in dicta, questioned whether a claim under § 1981 is adequately supported by at-will employment status.[85]

The court divided these district court cases into two categories.[86] The first group of cases "simply assume, without extensive analysis, that at-will employment relationships are *not* 'contracts' within the

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74. *Id.* (internal quotation marks omitted) (alteration in original) (quoting *Fadeyi*, 160 F.3d at 1052).

75. *Id.*

76. 933 F.2d 231 (4th Cir. 1991).

77. *Spriggs*, 165 F.2d at 1019. The district court cited *Conkwright* as an example of the Fourth Circuit's conclusion that "[i]n Maryland, an at-will employment 'contract' is, because of its lack of substance, unenforceable in an action ex contractu." Spriggs v. Diamond Auto Glass, No. S 97-1449, 1997 U.S. Dist. LEXIS 22476, at *2 (D. Md. Oct. 15, 1997).

78. *Spriggs*, 165 F.3d at 1019.

79. *Id.*

80. *Id.*

81. 964 F. Supp. 665 (E.D.N.Y. 1997).

82. *See Spriggs*, 1997 U.S. Dist. LEXIS 22476, at *2.

83. 165 F.3d at 1019; *see also id.* n.7 (citing other district court cases with the same holding).

84. Gonzales v. Ingersoll Milling Mach. Co., 133 F.3d 1025 (7th Cir. 1998).

85. *Spriggs*, 165 F.3d at 1019 (citing *Gonzalez*, 133 F.3d at 1035).

86. *Id.* at 1019-20.

meaning of § 1981," and therefore "hold [that] discrimination within such relationships cannot give rise to § 1981 claims."[87] Referring to its earlier analysis, the court again rejected that notion.[88] The second group, the court explained, consisted of cases that "acknowledge that the at-will employment relationship is a type of contract, but conclude that, because at-will employees have no contractual rights to specific terms of employment, they cannot challenge their contractually-permissible terminations under § 1981."[89] The court responded to this idea by stating that "[p]roving breach of the underlying contract is neither necessary to a successful § 1981 claim, nor, standing alone, sufficient to make out such a claim."[90]

4. Analysis.—In *Spriggs v. Diamond Auto Glass*, the Fourth Circuit reached the same conclusion as a majority of federal district courts that have decided the issue, as well as the only other federal circuit court to squarely address the issue. The *Spriggs* court concluded that Spriggs's at-will contract for employment was sufficient to bring a § 1981 claim. Not only did *Spriggs* follow the decision of the only other circuit to decide the issue by adopting the substantial analysis of the Fifth Circuit, but the Fourth Circuit also delved into a novel analysis in its rejection of those cases that have reached the opposite conclusion. Overall, the court's analysis will withstand various criticisms, as the court did not solely rely on any one facet in accepting at-will employee claims under § 1981. The Fourth Circuit's decision in *Spriggs* has begun to solidify the precedent within the federal appellate

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87. *Id.* (emphasis added) (citing Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665, 675-76 (E.D.N.Y. 1997), aff'd, 162 F.2d 1148 (2d Cir. 1998); Moskowitz v. Brown, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994); Askew v. May Merchandising Corp., No. 87 CIV. 7835 (JFK), 1991 WL 24390, at *5-6 (S.D.N.Y. Feb. 20, 1991)).

88. 165 F.3d at 1019 ("Our analysis above explains our disagreement with this group of cases."). The court probably was referring to its interpretation of congressional intent in that the definition of contract was to be an ordinary one. *See supra* note 70 and accompanying text. The court was probably also referring to its conclusion that the amendments to § 1981 had broadened its scope. *See supra* note 60 and accompanying text.

89. *Spriggs*, 165 F.3d at 1019 (citing *Gonzalez*, 133 F.3d at 1035; Hawkins v. Pepsico, Inc., 10 F. Supp. 2d 548, 553-54 (M.D.N.C. 1998)).

90. *Id.* at 1020. In a footnote, the court noted that the Supreme Court had reached the same conclusion in *Patterson* through different reasoning. *Id.* at 1020 n.8. In *Patterson*, the Court rejected the view that "racial harassment in the conditions of employment is actionable when, and only when, it amounts to a breach of contract under state law." Patterson v. McLean Credit Union, 491 U.S. 164, 182 (1989). The court in *Fadeyi* made a similar point, as the *Spriggs* court noted, when the Fifth Circuit stated that under Texas law, "[e]ven though an at-will employee can be fired for good cause, bad cause, or no cause at all, he or she cannot be fired for an illicit cause." *Spriggs*, 165 F.3d at 1020 (citing *Fadeyi*, 160 F.3d at 1051-52).

courts, as the court employed solid legal analysis, with well-founded support, in reaching its ultimate holding.

The *Spriggs* court properly followed the reasoning and holding of *Fadeyi*. The *Spriggs* court, however, could have solidified its holding even more by providing the same depth in analysis that the *Fadeyi* decision provided.[91] In citing *Fadeyi*, the court discussed how the Fifth Circuit reviewed *Patterson*, the 1991 Act, and the Act's legislative history.[92] The court in *Spriggs* extracted only a small portion of the reasoning used in *Fadeyi*, the portion discussing how Congress could not have meant to exclude at-will workers from the reach of § 1981.[93] The Fourth Circuit, while providing more detail in its analysis than most of the district courts that have decided the issue, neglected to mention the other substantial arguments[94] made by the Fifth Circuit in *Fadeyi*, and simply concluded that its decision is consistent with the holding in *Fadeyi*.[95] A discussion of the Fifth Circuit's entire analysis is necessary to understand fully what the Fourth Circuit has endorsed in agreeing with *Fadeyi*.

Fadeyi has served, and probably will continue to serve, as the backbone case regarding whether at-will employment relationships satisfy the contractual requirement of § 1981(b). The court in *Spriggs* relied upon the precedent set forth in *Fadeyi* as support for its decision.[96]

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91. 165 F.3d at 1019.

92. *Id.*

93. *Id.* (citing *Fadeyi*, 160 F.3d 1048, 1052 (5th Cir. 1998)).

94. As is discussed *infra*, the Fourth Circuit in *Spriggs* neglected to recognize the discussion devoted to *Patterson* in *Fadeyi*. In *Fadeyi*, the court concluded that the Supreme Court in *Patterson* had condoned, implicitly, at-will employees bringing § 1981 claims. *See infra* notes 97-100 and accompanying text. Additionally, *Spriggs* neglected to mention *Fadeyi*'s discussion of the analysis of the Southern District Court of New York in *Harris v. New York Times*, No. 90 CIV. 5235 (CSH), 1993 WL 42773 (S.D.N.Y. Feb. 11, 1993). In *Harris*, the district court noted that a formal contract was absent in *Patterson*, yet the employment relationship was deemed to be sufficiently contractual in nature to bring a § 1981 claim. *See infra* notes 101-106 and accompanying text.

95. *Fadeyi* has been used by various district courts in reaching the same conclusion regarding at-will contracts satisfying the contractual requirement of § 1981. *See, e.g.*, Price v. Wisconsin Servs. Corp., No. 98-C-0721, 1999 U.S. Dist. LEXIS 10913, at *7 (E.D. Wis. July 14, 1999); Robinson v. SABIS Educ. Sys., No. 98 C 4251, 1999 U.S. Dist. LEXIS 9065, at *28 (N.D. Ill. June 3, 1999); Jones v. SABIS Educ. Sys., Inc., No. 98 C 4252, 1999 U.S. Dist. LEXIS 9261, at *16 (N.D. Ill. May 28, 1999); Lazaro v. Good Samaritan Hosp., No. 98 CIV. 5980 (BDP), 1999 U.S. Dist. LEXIS 6936, at *8 (S.D.N.Y. May 6, 1999); Curtis v. Dimaio, 46 F. Supp. 2d 206, 211-12 (E.D.N.Y. 1999); LaRocca v. Precision Motorcars, Inc., 45 F. Supp. 2d 762, 775 (D. Neb. 1999); Gandy v. Gateway Found., No. 97 C 2286, 1999 WL 102777, at *17 (N.D. Ill. Feb. 22, 1999); O'Neal v. Ferguson Constr. Co., 35 F. Supp. 2d 832, 837 (N.M. 1999); Walker v. Thompson, No. 3:97-CV-2437-R, 1999 U.S. Dist. LEXIS 219, at *29 (N.D. Tex. Jan. 12, 1999); Byers v. The Dallas Morning News Inc., No. 3:97-CV-1159-R, 1999 U.S. Dist. LEXIS 233, at *14 (N.D. Tex. Jan. 7, 1999).

96. *See supra* notes 72-75 and accompanying text.

Unlike *Spriggs*, the *Fadeyi* court devoted a sizeable portion of its opinion to a discussion of *Patterson*.[97] The most significant part of that discussion was the Fifth Circuit's analysis of the following statement made by the Supreme Court in *Patterson*:

> [t]he question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981.[98]

The Fifth Circuit interpreted this statement as "leav[ing] no doubt that the Supreme Court considered the employee's relationship with her employer to be a contractual one: Obviously, there can be no 'new contract' unless there is first an old *contract*."[99] From the above statement, the *Fadeyi* court concluded that, in *Patterson*, the Supreme Court "implicitly conceded that an at-will employee may maintain a cause of action under § 1981."[100]

In analyzing the Court's opinion in *Patterson*, the Fifth Circuit also looked to *Harris v. New York Times*[101] for the district court's interpretation.[102] As the Southern District Court of New York noted in *Harris*, that particular statement in *Patterson* must be construed as the "Court regard[ing] Patterson's relationship with her employer—the rendition of services in exchange for the payment of wages—as sufficiently contractual in nature to satisfy § 1981."[103] Furthermore, the court made an astute observation when it stated that nowhere in *Patterson* was there a declaration of a formal contract between the parties.[104] Rather, the Supreme Court's opinion simply states that Patterson "was employed by respondent . . . as a teller and a file coordinator."[105] The discussion of *Patterson* in *Harris* and in *Fadeyi* comprised a significant portion of those courts' opinions.[106]

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97. *Compare Spriggs*, 165 F.3d at 1019, *with Fadeyi*, 160 F.3d at 1049-50 (discussing *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)).

98. 160 F.3d at 1050 (internal quotation marks omitted) (quoting *Patterson*, 491 U.S. at 185) (footnote omitted).

99. *Id.*

100. *Id.*

101. No. 90 CIV. 5235 (CSH), 1993 WL 42773 (S.D.N.Y. Feb. 11, 1993).

102. *See Fadeyi*, 160 F.2d at 1050 n.15.

103. *Harris*, 1993 WL 42773, at *4; *see also Fadeyi*, 160 F.2d at 1050 n.15.

104. *Id.*

105. Patterson v. McLean Credit Union, 491 U.S. 164, 169 (1989).

106. *See Fadeyi*, 160 F.3d at 1049-50 (discussing *Patterson*); *Harris*, 1993 WL 42773, at *3-4 (same). The analyses of *Patterson* are persuasive. Because the Court's decision came out prior to the amendments to § 1981 contained in the Civil Rights Act of 1991, the implicit

The Fifth Circuit in *Fadeyi* also discussed Justice Stevens's ideas concerning at-will employment relationships.[107] In his separate opinion, Justice Stevens stated that "[a]n at-will employee, such as Patterson, is not merely performing an existing contract; she is constantly remaking that contract."[108] From there, the court in *Fadeyi* outlined the legislative history, which it claimed, "reflects the intent of Congress to protect minorities in their employment relationships."[109] The court further noted that the House Judiciary Report stated that the 1991 Act "was designed to restore and strengthen civil rights laws that ban discrimination in employment."[110] The court subsequently concluded that "[t]o hold that at-will employees have no right of action under § 1981 would effectively eviscerate the very protection that Congress expressly intended to install for minority employees, especially those who, by virtue of working for small businesses, are not protected by Title VII."[111] Finally, the court applied Texas law[112] and determined that "even though an at-will employee can be fired for good cause, bad cause, or no cause at all, he or she cannot be fired for an illicit cause."[113] Earlier in the opinion, when discussing the case history, the court stated that, while Texas law recognized that the employers can fire at-will for "good cause, bad cause, or no cause at all, . . . does not necessarily follow, . . . that the employment-at-will relationship is not a contractual one for the purposes of § 1981."[114]

Although the court in *Spriggs* stated that it agreed with the Fifth Circuit's decision, it did not provide a full discussion of the depth of the analysis in *Fadeyi*. In endorsing *Fadeyi*, the Fourth Circuit was subscribing to the Fifth Circuit's in-depth discussion of both *Patterson* and the congressional intent in enacting the Civil Rights Act of 1991. The *Spriggs* court also neglected to mention the extent of *Fadeyi*'s reliance on state law in reaching their final conclusion, which may prove signif-

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approval of at-will contracts maintaining claims under § 1981 makes that conclusion all the more persuasive for future cases.

107. 160 F.2d at 1050 (citing *Patterson*, 491 U.S. at 221 (Stevens, J., concurring in part and dissenting in part)).

108. *Id.* (quoting *Patterson*, 491 U.S. at 221 (Stevens, J., concurring in part and dissenting in part)).

109. *Id.*

110. *Id.* (quoting H.R. REP. NO. 102-40, pt. 2, at 2 (1991)).

111. *Id.*

112. The Fifth Circuit's discussion of Texas law becomes significant when district courts analyze the analysis employed within *Fadeyi*. Various district courts have noted the reliance on state law in both *Fadeyi* and *Spriggs*. *See infra* notes 152-171 and accompanying text (discussing and interpreting the extent of reliance on state law in *Fadeyi* and *Spriggs* and its impact on the precedential effect of their holdings).

113. *Id.* at 1051-52.

114. *Fadeyi*, 160 F.3d at 1049.

icant when district courts look to both *Fadeyi* and *Spriggs* for their precedential effect. While the *Spriggs* court briefly touched on the important points in *Fadeyi*, the analysis it embraced was actually much more extensive. The reliance on *Fadeyi* both aids in the understanding of the decision in *Spriggs*, as well as buttresses the strength of its holding.

In addition to its deference to *Fadeyi*, another notable aspect of the *Spriggs* decision concerned the court's rejection of the arguments against allowing at-will employees to bring claims under § 1981. The Fourth Circuit's discussion contained a simple, yet novel, classification of these various district court cases.[115] The first group, the court claimed, consisted of cases in which courts had decided that at-will employment relationships were simply not contracts.[116] The court accurately stated that the analysis employed by the courts in these cases was not extensive enough.[117] In response to the reasoning in these cases, the court merely declared that its previous discussion sufficiently explained its disagreement.[118] It is assumed that the court was referring to its analysis of the existence of the elements of a contract, as well as to Congress's intent in enacting the Civil Rights Act of 1991 as a direct response to *Patterson*, culminating in the creation of § 1981(b).[119] *Moorer*, *Moscowitz*, and *Askew* were all cited as falling under this category, but were not, however, discussed by the court in *Spriggs*.[120]

The first of these New York cases to be decided was *Askew*. The district court took a rather superficial look at the employment relationship between the plaintiff-employee and the defendant-employer. First of all, the court stated that the plaintiff's original deposition, in which the plaintiff denied having any type of contractual relationship with his employer, was detrimental to his current § 1981 claim.[121]

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115. *Id.* at 1019-20; *see supra* notes 86-90 and accompanying text.

116. *Fadeyi*, 160 F.3d at 1019; *see supra* note 87.

117. *Fadeyi*, 160 F.3d at 1019. The court cited as examples the following: *Moorer*, 964 F. Supp. at 675-76; Moscowitz v. Brown, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994); Askew v. May Merchandising Corp., No. 87 CIV. 7835 (JFK), 1991 WL 24390, at *5-6 (S.D.N.Y. Feb. 20, 1991).

118. *Id.* Specifically, the court expressly stated that "[o]ur analysis above explains our disagreement with this group of cases." *Id.*; *see also supra* note 88.

119. *See supra* notes 57-71 and accompanying text (discussing the court's reasoning).

120. 165 F.3d at 1018 (citing, yet failing to discuss, *Moorer*, 964 F. Supp. at 675-76; *Moscowitz*, 850 F. Supp. at 1192; *Askew*, 1991 WL 24390, at *6).

121. *Askew*, 1991 WL 24390, at *4. Thus, plaintiff asserted that he did, in fact, have a written employment agreement, although of indefinite duration. *See id.* The plaintiff further contended that such a relationship was established when he "commenc[ed] work . . . in response to a written confirmation of an offer of employment from [the defendant]." *Id.*

The court then concluded that "the courts of New York would not consider [the defendant's] letter to be evidence of an employment contract, but simply an offer of employment at the will of the employer . . . . [which] is the regular rule in New York,"[122] without really delving into any sort of analysis on the matter. The court boldly stated that it was clear that "the absence of a contractual relationship is fatal to this type of section 1981 claim."[123] In contrast, the Fourth Circuit in *Spriggs* analyzed Spriggs's at-will employment relationship to determine if it contained the requirements of a contract.[124] Rather than merely dismiss the employment relationship as at-will, and therefore not a contract, the Fourth Circuit delved deeper to find out if the essential elements of a contract existed nonetheless.

In *Moscowitz*, the same federal district court in New York relied on *Patterson* because the Civil Rights Act of 1991 had no retroactive effect[125] and because the cause of action had occurred in January 1991.[126] *Patterson*, however, held that § 1981 merely proscribed discriminatory conduct prior to the formation of a contract, and did not specifically address the issue of the validity of claims brought by at-will employees.[127] Thus, while *Patterson* would prevent a successful § 1981 claim due to the timing of the discriminatory conduct, it would still not deter the conclusion that an at-will contract is, in fact, a contract. At least one court, however, has concluded that *Patterson* implied that at-will employees could bring a claim under § 1981.[128]

Most recently, in *Moorer*, the District Court for the Eastern District of New York cited the decisions in both *Moscowitz* and *Askew* but neglected to provide any support beyond such citations to other courts' decisions on the issue.[129] The *Moorer* court blindly adopted these previous decisions that required the existence of a contractual relationship in bringing a § 1981 claim. Thus, the New York court never

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122. *Id.*

123. *Id.* at *5. Additionally, the court cited *Patterson* as controlling. *Id.* The Civil Rights Act of 1991 took effect in November of 1991, thus the narrow interpretation of "make and enforce" contracts was still powerful precedent.

124. *See supra* notes 61-65 and accompanying text (discussing the court's conclusion that the Spriggs-Diamond employment relationship contained the contractual elements of offer, acceptance and consideration).

125. 850 F. Supp. at 1192 (referring to the 1994 Supreme Court decision of *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), which declared that the Civil Rights Act of 1991 has no retroactive effect).

126. *Id.* at 1189.

127. 491 U.S. 164 (1989).

128. *See supra* notes 101-105 and accompanying text (acknowledging the Fifth Circuit's recognition of the district court's analysis in Harris v. New York Times, No. CIV. 5235 (CSH), 1993 WL 42773 (S.D.N.Y. Feb. 11, 1993)).

129. 964 F. Supp. 665, 675-76 (E.D.N.Y. 1997).

provided a valid reason for determining that an at-will employment relationship does not constitute a contract.

Contained in the *Spriggs* court's earlier discussion, which the court said fully explained its disagreement with the cases in the first category, was a reference to the district court case of *Lane v. Ogden Entertainment Inc.*[130] *Lane* was cited as support for the conclusion that the Fourth Circuit had seen "no indication that, when drafting the original § 1981 or the amending 1991 Act, Congress intended the term 'contract' to have any meaning other than its ordinary one."[131] Therefore, when the court referred to its earlier analysis as a reason for disagreeing with the cases within the first category, it was citing the district court's analysis regarding the context of the term "contract."

In *Lane*, the District Court for the Middle District of Alabama recognized that the defendant-employer was possibly "confus[ing] the issue of whether the employee has a 'contract' in the sense used in labor law—i.e., employment for an agreed duration, with certain benefits and protections—with the issue of whether there is a contract between an employer and an at-will employee at all."[132] The court in *Lane* further concluded that "[e]ven at-will employees have some sort of contract, in the broader legal sense of that term, with their employer."[133] *Spriggs*' citation to the Alabama court's distinction between the basic legal meaning of "contract" and a "specialized labor law meaning"[134] further strengthened the precedential effect of its holding, as well as simultaneously addressing the dearth of strong legal analysis from cases under the first category delineated by the court. The Fourth Circuit's endorsement of the analysis provided in *Lane* is much more persuasive than that provided in *Askew*, *Moscowitz*, and *Moorer*. While the Fourth Circuit supported its conclusion from various angles, these district court cases failed to provide sound reasoning to support their holdings.

The second category classified by the Fourth Circuit consisted of those cases that recognized that at-will employment relationships are contracts, but concluded that no claims could be brought under

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130. 13 F. Supp. 2d 1261 (M.D. Ala. 1998).

131. 165 F.3d at 1018 (citing *Lane*, 13 F. Supp. 2d at 1272).

132. 13 F. Supp. 2d at 1272. In *Lane*, the plaintiffs were black females who claimed that they were discriminated against when they were not promoted within their company. There was, however, much dispute regarding whether Lane was in fact offered the position because the "requirements and process of application were . . . somewhat disordered." *Id.* at 1265. Additionally, after the person hired in that position left Ogden, Lane took on some of those responsibilities in the intervals between the replacements. *See id.* at 1266.

133. *Id.*

134. *Id.*

§ 1981 due to a lack of contractual rights.[135] The Fourth Circuit further clarified the category; in addition to proving purposeful racial discrimination, a § 1981 plaintiff must prove that the discriminatory act violated a specific contract right.[136] The court only cited two cases in this group, *Gonzalez v. Ingersoll Milling Machine Co.*,[137] and *Hawkins v. Pepsico Inc.*[138] The Fourth Circuit's response to the decisions of courts falling into the second category was to declare that "[p]roving breach of the underlying contract is neither necessary to a successful § 1981 claim, nor, standing alone, sufficient to make out such a claim."[139] The court dismissed this second group of cases saying, quite simply, that although an employer may be acting completely within his contractual rights, a § 1981 action may still be brought if an "action is racially discriminatory and affects one of the contractual aspects listed in § 1981(b)."[140] The court subsequently referred to the Fifth Circuit's opinion in *Fadeyi*, in which it declared that while there are instances in which an at-will employee could legitimately be fired, an illicit cause did not qualify as one of those instances.[141]

The court in *Spriggs* approached this argument from a vastly different perspective than those courts falling in the second category of cases. The Fourth Circuit took a more practical, policy-based approach, while courts like *Gonzalez* and *Hawkins* took a literalist approach. In general, the reasoning employed in *Spriggs*, was more realistic considering Congress's intent in amending § 1981.[142]

Both the district court in *Hawkins*, as well as the Seventh Circuit in *Gonzalez*, focused on the fact that neither plaintiff had established a duration of employment.[143] While both courts are technically correct in stating that there was no contract delineating a duration of employ-

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135. 165 F.3d at 1019; *see also supra* notes 89-90.

136. *See Lane*, 13 F. Supp. 2d at 1019-20 (providing a brief but profound analysis of courts rejecting at-will employee claims due to the lack of an enforceable contractual right).

137. 133 F.3d 1025 (7th Cir. 1998). In fact, the court did not actually decide the issue of whether at-will employees could bring a claim under § 1981.

138. 10 F. Supp. 2d 548 (M.D.N.C. 1998).

139. *Spriggs*, 165 F.3d at 1020.

140. *Id.*

141. *Id.*; *see supra* note 113 and accompanying text.

142. *See supra* notes 29-32 (discussing the congressional intent).

143. *See Hawkins*, 10 F. Supp. 2d at 554 (stating that the "[p]laintiff had no contract with respect to the continuation or duration of her employment. Thus, Plaintiff's discriminatory and retaliatory discharge claims do not arise out [sic] a contractual relationship"); *Gonzalez*, 133 F.3d at 1035 (concluding that "since [the plaintiff] . . . was an employee at-will, and did not have any contractual rights regarding the term of her employment, she cannot claim that she was discriminated against with respect to [the defendant's] . . . layoff").

ment, it does not automatically negate the existence of an overall contract for employment. It appeared that the courts overlooked the premise on which § 1981 was amended, in concluding that, due to the absence of an agreement regarding the duration of employment, an at-will employee is precluded from bringing suit under § 1981.

In contrast, in determining that there is no § 1981 requirement demanding that a violation of a specific contract right be proven,[144] the Fourth Circuit's reasoning was consistent with Congress's intentions in enacting the Civil Rights Act of 1991.[145] The House Report discussing the purpose of amending § 1981 expressly states that the statute is of "particular importance" because it is the "only federal law banning race discrimination in all contracts. It has been a critically important tool used to strike down racially discriminatory practices in a broad variety of contexts."[146] Congress amended the statute specifically to reverse the effects of the narrow interpretations of the provisions by the Supreme Court in *Patterson*.[147] Therefore, Congress has broadened the scope of § 1981. It follows that Congress did not intend to further limit the use of § 1981 by restricting at-will employees from its protections. The entire premise of the Civil Rights Act of 1991 was to curb discriminatory practices.[148] Hence, creating further restrictions in the application of a statute that was enacted as a direct response to the Supreme Court's narrow interpretation, would not be consistent with the purpose of amending § 1981.

The majority of courts deciding the issue have agreed with the reasoning in both *Fadeyi* and *Spriggs*.[149] *Spriggs* briefly touched on all of the important arguments made on behalf of allowing at-will employees to bring § 1981 claims,[150] thereby strengthening its precedential power since the holding cannot be summarily dismissed due to substantial reliance on a single point of either fact or law.[151] Two dis-

144. In a footnote, the Fourth Circuit recognized that, in *Patterson*, the Supreme Court reached the same conclusion. *Spriggs*, 165 F.3d at 1020 n.8. The court, however, did not rely on the Supreme Court's decision due to the undermining effects of the Civil Rights Act of 1991. *Id.*

145. *See supra* notes 29-32 and accompanying text; *see also supra* notes 93 and 109-111 and accompanying text (discussing the analysis contained within *Fadeyi* regarding the overall purpose of § 1981).

146. H.R. REP. No. 102-40, pt. 2, at 35 (1991).

147. *See supra* notes 29-32 and accompanying text.

148. *See supra* note 110.

149. *See supra* notes 41-42 (listing, respectively, cases agreeing and disagreeing with result reached in *Spriggs*).

150. *See Spriggs*, 165 F.3d at 1018-20.

151. The Fourth Circuit did not limit its discussion regarding at-will employees bringing claims under § 1981 to a sole point. Instead, the court discussed a plethora of reasons supporting its holding, as well as deftly rejecting the reasoning employed by courts reach-

trict courts, however, have identified limitations on the applicability of both *Fadeyi* and *Spriggs*.

In *Curtis v. Dimaio*,[152] the court for the Eastern District of New York noted that both circuit court cases were based, at least in part, on a finding that at-will employment was contractual under the relevant state law.[153] The Fourth Circuit in *Spriggs* did confirm that "Maryland courts recognize that at-will employment relationships are contracts."[154] As support for its conclusion, the Fourth Circuit did refer to the Maryland Court of Special Appeals's conclusion that "[i]n Maryland, *at-will employment is a contract* of indefinite duration that can be terminated at the pleasure of either party at any time."[155] While such reliance on pertinent state law may be perceived as a liability in citing *Spriggs* as persuasive precedent, the district court in *Curtis* made an important distinction in recognizing that the Fourth's, as well as the Fifth Circuit's, decisions were based only *in part* on the respective state laws.[156] The Fourth Circuit did not rely *solely* on Maryland law in determining that at-will employment contracts are actionable under § 1981.[157] Although the Fifth Circuit devoted substantially more attention to Texas law regarding at-will employment contracts than the Fourth Circuit,[158] *Fadeyi* is still not in danger of losing its precedential force since the Fifth Circuit also based its decision rather heavily on the congressional response to *Patterson*.[159]

Upon close examination of the argument against *Spriggs* and *Fadeyi* for their reliance on state law, it becomes apparent that a court

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ing the opposite conclusion. The court's analysis consisted of discussions concerning: (1) the legislative history of § 1981, which includes *Patterson* and the Civil Rights Act of 1991; (2) the requirements of a contract—offer, acceptance, and consideration; (3) Maryland law accepting at-will employment relationships as contracts; (4) congressional intent regarding the meaning of "contract"; (5) the Fifth Circuit's decision in *Fadeyi*; (6) the district court's misapplication of a previously decided Fourth Circuit decision; and (7) the classification of courts deciding the contrary and how the Fourth Circuit rejected their misguided reasoning. *See supra* notes 57-90 and accompanying text (discussing the court's reasoning). Therefore, because the *Spriggs* court did not limit its discussion to any one aspect, the holding may not be summarily dismissed due to disagreement with a single point of analysis.

152. 46 F. Supp. 2d 206 (E.D.N.Y. 1999).

153. *Id.* at 211-12.

154. *Spriggs*, 165 F.3d at 1018.

155. *Id.* (emphasis added) (citing Hrehorovich v. Harbor Hosp. Ctr., Inc., 93 Md. App. 772, 790, 614 A.2d 1021, 1030 (1992)).

156. *Curtis*, 46 F.Supp. at 211-12.

157. *See supra* notes 57-90 and accompanying text (discussing the court's reasoning).

158. *See Fadeyi*, 160 F.3d at 1050-51.

159. *See id.* at 1049-50 (analyzing the legislative history of § 1981); *see also supra* notes 97-114 and accompanying text for further discussion of the overall analysis employed in *Fadeyi*).

is essentially stating that a specific contract right must be proven to have been violated in order to bring a successful claim under § 1981. Therefore, such cases fall under the second category of cases discussed in *Spriggs*, that rejected claims by at-will employees under § 1981.[160] For instance, the court in *Curtis* noted that a Missouri district court rejected *Spriggs* and *Fadeyi* because, in Missouri, the absence of a durational agreement for employment results in an at-will employment relationship,[161] and the "Missouri Supreme Court [had] made it clear that a statement of duration is 'an essential element to an employment contract.'"[162] In fact, the Missouri court was simply narrowly interpreting § 1981 to exclude at-will employment relationships. Claiming differences in state law disguises the underlying view that a specific contract right must be shown to have been violated to prevail under § 1981.

In contrast, in *Robinson v. SABIS Educational Systems*,[163] the Federal District Court for the Northern District of Illinois distinguished the two circuit court cases by commenting that *Fadeyi* relied heavily on state law, while *Spriggs* did not.[164] The *Robinson* court considered *Spriggs* to be more persuasive than *Fadeyi* due to the alleged lack of reliance on applicable state law overall.[165] The Fourth Circuit, however, did rely on Maryland law in making its decision, although it did not do so entirely.[166] Additionally, the court in *Robinson* noted the degree of variance between Illinois and Texas law with respect to at-will employees.[167] While it is true that the Fifth Circuit devoted more attention to Texas law than did the Fourth Circuit to Maryland law,[168] the reliance on Maryland law in *Spriggs* does not warrant an entire dismissal of the holding.

While both *Curtis* and *Robinson* ultimately concluded that at-will employment relationships did satisfy the contractual requirement in bringing § 1981 claims,[169] their observations concerning the reason-

160. *See supra* notes 135-141 and accompanying text.

161. *Curtis*, 46 F. Supp. at 212.

162. *Id.*; *see also* Jones v. Becker Group of O'Fallon Div., 38 F. Supp. 2d 793, 796 (E.D. Mo. 1999) (citing Luethans v. Washington Univ., 894 S.W. 2d 169, 172 (Mo. 1995)).

163. No. 98 C 4251, 1999 U.S. Dist. LEXIS 9065 (N.D. Ill. June 3, 1999).

164. *Id.* at *32 n.9.

165. *Id.*

166. *See supra* notes 57-90 and accompanying text (discussing the court's reasoning).

167. *Robinson*, 1999 U.S. Dist. LEXIS 9065, at *32 n.9. In a footnote, the court recognized that "Texas state law (unlike Illinois) permits an at-will employee to maintain a tortious interference with contract claim." *Id.*

168. *Compare Fadeyi*, 160 F.3d 1048, 1050-52 (5th Cir. 1998), *with Spriggs*, 165 F.3d 1015, 1018 (4th Cir. 1999).

169. *Curtis*, 46 F. Supp. at 212; *Robinson*, 1999 U.S. Dist. LEXIS, at *32.

ing contained in both *Fadeyi* and *Spriggs* are significant. It is quite possible that, when other circuits are confronted with the issue, they will also take notice of the degree of reliance on state law in both *Spriggs* and *Fadeyi*, just as the court in *Robinson* did. While many district court cases have accepted § 1981 claims from at-will employees,[170] some courts may, although incorrectly, distinguish both the Fourth and Fifth Circuit cases on the ground that at-will employment is not contractual under the law of the forum state. The strongest rebuttal to that argument with regard to *Spriggs* is that the court did not solely rely on Maryland law in reaching its final holding.[171] In fact, the court's opinion in *Spriggs* most closely resembles a dim sum of arguments regarding at-will employment relationships satisfying the contractual requirement of § 1981(b), rather than merely focusing on one point to support its ultimate conclusion.

5. Conclusion.—The Fourth Circuit's decision in *Spriggs* has been consistent with the view of most jurisdictions regarding the issue as to whether at-will employment relationships satisfy the contractual requirement under § 1981. In reaching its decision, the court agreed with the reasoning of the only other circuit to have squarely decided this precise issue. The acceptance of at-will contracts in bringing claims under § 1981 is both logical and practical. The legislative intent of Congress in passing the Civil Rights Act of 1991, and the courts' interpretations of the resulting amendments, were correctly elucidated and applied in *Spriggs*. That intent encompassed the expansion of the "make and enforce contracts" phrase of § 1981(b) to correct the disastrous effects of *Patterson*. In *Spriggs*, the Fourth Circuit employed strong legal analysis, both in its arguments supporting at-will employees bringing § 1981 claims, as well as in refuting the arguments of courts holding the contrary. Furthermore, the Fourth Circuit smartly relied on numerous arguments in support of its ultimate conclusion, which will prevent its holding from being succinctly dismissed by a court finding fault with a distinct point of analysis. The court's analysis will inevitably prove to be a factor in future circuit court decisions.

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170. *See supra* note 41.
171. *See supra* notes 57-90.

B. The Varying Treatment and Scope of Mandatory Arbitration Agreements and their Impact on Statutory Employment Rights

In *Equal Employment Opportunity Commission v. Waffle House, Inc.*,[1] the United States Court of Appeals for the Fourth Circuit addressed the issue of whether an arbitration agreement between Waffle House, Inc. and a former employee was binding on the Equal Employment Opportunity Commission (EEOC) when prosecuting a suit in its own name.[2] The Court of Appeals held that the EEOC cannot be compelled, because of an arbitration agreement between the charging party and their former employer, to arbitrate its claims against that employer.[3] When the EEOC, however, seeks specific monetary relief for the individual subject to an arbitration agreement, it is precluded from seeking that relief in a judicial forum.[4] The Fourth Circuit, in addition, decided that the EEOC was not a party to the arbitration agreement and that the statutory scheme supporting the EEOC's enforcement powers did not require it to arbitrate any claim when it affects its public mission of eradicating discrimination in the workplace.[5] The Court of Appeals's definitive language clarifies what the EEOC is permitted to enforce and what remedies it is entitled to seek. The decision substantially eliminates any specific individual relief outside the arbitrational arena when the charging party's terms of employment are subject to such an agreement.[6] Less clear, however, is how this decision fits in with the surrounding case law and its impact on employment relations.

1. The Case.—On June 23, 1994, Erin Baker entered a Waffle House establishment located in Columbia, South Carolina and filled out an application for employment.[7] The application included an arbitration clause.[8] Mr. Baker, the charging party, declined the manager's offer of employment and then subsequently called another nearby Waffle House and eventually accepted their offer for a position

1. 193 F.3d 805 (4th Cir. 1999).

2. *Id.* at 807 (noting that the employment application had a clause requiring the applicant to submit to binding arbitration "any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment" (internal quotation marks omitted)).

3. *Id.* at 806-07.

4. *Id.* at 807.

5. *Id.* at 809.

6. *See id.* at 806-07.

7. *See id.* at 807.

8. *See id.*; *see also supra* note 2 (describing the arbitration clause).

as a grill cook.[9] Two weeks later, at his home, Mr. Baker suffered a seizure caused by a change in his medication intended to suppress a seizure disorder stemming from a prior car accident.[10] The following day, while at work, Mr. Baker suffered another seizure.[11] On September 5, 1994, Mr. Baker was terminated by Waffle House.[12]

Mr. Baker proceeded to file a charge with the EEOC alleging that his discharge violated the Americans with Disabilities Act of 1990 (ADA).[13] On September 9, 1996, the EEOC filed an enforcement action, in its own name, against Waffle House alleging "unlawful employment practices at its West Columbia, South Carolina, facility."[14] The EEOC sought the following forms of relief: a permanent injunction barring Waffle House from engaging in employment practices that discriminate based on disabilities; an order that Waffle House institute and implement anti-discrimination policies, practices, and programs to create opportunities and to eradicate the effects of past and present discrimination based on disability; backpay and reinstatement for Mr. Baker; compensation for pecuniary and nonpecuniary losses by Mr. Baker; and punitive damages.[15]

Waffle House responded by filing a petition under the Federal Arbitration Act (FAA)[16] to compel arbitration and to stay the litigation or, alternatively, to dismiss for failure to state a claim upon which relief can be based.[17] The motion was referred to a magistrate judge, who determined that Mr. Baker had entered into a valid arbitration agreement and that the EEOC was required to arbitrate with Waffle House the claims that it had filed on behalf of Mr. Baker.[18] The district court disagreed with the magistrate judge's findings and subse-

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9. *See Waffle House*, 193 F.3d at 807. The court noted that Mr. Baker left blank the line indicating which position he was seeking. *See id.* at 808.

10. *See id.* at 807 (indicating that this condition could have been caused by a change in Mr. Baker's medication).

11. *See id.*

12. *See id.* (noting that in the separation notice Waffle House listed the reason for Mr. Baker's dismissal—"[w]e decided that for [Baker's] benefit and safety and Waffle House it would be best he not work any more").

13. *See id.*; *see also* Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

14. *See Waffle House*, 193 F.3d at 807 (internal quotation marks omitted) (noting that the EEOC filed this action pursuant to section 107(a) of the ADA).

15. *See id.*

16. Federal Arbitration Act, ch. 392, § 1, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C. §§ 1-307 (1990)).

17. *Waffle House*, 193 F.3d at 808.

18. *See Waffle House*, 193 F.3d at 808.

quently denied each of Waffle House's motions.[19] Waffle House then filed an interlocutory appeal challenging the district court's denial of its motions to compel arbitration and to stay the proceedings.[20] The United States Court of Appeals for the Fourth Circuit was called upon to resolve the issue of whether and to what extent an arbitration agreement between private parties binds the EEOC when prosecuting a suit in its own name.

2. Legal Background.—

a. The Americans with Disabilities Act of 1990 and Arbitration.— In enacting the ADA, the United States Congress expanded the enforcement powers vested in Title VII of the Civil Rights Act of 1964.[21] As originally enacted, those powers were limited to mere investigatory and conciliatory functions.[22]

Under the new amendments, Congress created a dual system of enforcement encompassing both private and governmental rights and remedies and access to dispute resolution forums.[23] In fashioning these remedies, Congress intended to provide for alternative, nonjudicial forums to resolve statutory employment disputes.[24] As the Fourth Circuit has recognized, however, Congress intended for the EEOC, as opposed to private remedies, to have dominance in resolving disputes

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19. *See id.* (discussing that the district court determined that the arbitration agreement contained in Baker's employment application was not applicable because the Waffle House location that ultimately hired Mr. Baker had not hired him pursuant to his earlier application submitted to the Columbia Waffle House facility).

20. *See id.*

21. *See Waffle House*, 193 F.3d at 809 (noting widespread noncompliance by employers that required congressional amendment to Title VII authorizing the EEOC the right to file suit in its own name in federal court).

22. *Id.*; *see also* EEOC v. General Elec. Co., 532 F.2d 359, 372 (4th Cir. 1976) (explaining that "[p]rior to the Amendments, the EEOC lacked any 'coercive enforcement powers'" and that the EEOC's "role was simply that of 'the conferee, conciliator and uncoercive persuader'" (citations omitted)).

23. *See General Elec. Co.*, 532 F.2d at 373 (noting that "Congress intended by the [1972 Title VII] Amendments to place primary reliance upon the powers of enforcement to be conferred upon the Commission").

24. *See* 42 U.S.C. § 12212 (1994) ("Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this [Act]."); *see also* Jan William Sturner, *Arbitration, Labor Contracts, and the ADA: The Benefits of Pre-Dispute Arbitration Agreements and an Update on the Conflict Between the Duty to Accommodate and Seniority Rights*, 21 U. ARK. LITTLE ROCK L.J. 455, 458 (1999) (quoting United States Representative Dan Glickman (D-Kan.), the author of section 12212 of the ADA, as stating that "[t]his provision should serve as a reminder that rights and litigation are not one in the same" and that "[t]here are better ways to achieve the goals of the ADA than litigation and we should encourage cooperation in achieving those goals, not confrontation").

and achieving equal employment opportunity.[25] While the legislation reflects a preference for alternative forms of dispute resolution, Congress did envision limits and restrictions on the use of alternative dispute resolution procedures. An agreement to submit statutory claims to binding arbitration, therefore, cannot absolutely preclude an injured party from seeking relief under the enforcement provisions of the ADA.[26] Nor does it prevent the EEOC from conducting its public mission of eradicating workplace discrimination.[27]

In bringing a discrimination suit, under the ADA, the EEOC and a private party have distinct interests even though those separate interests may overlap.[28] In enforcing the federal anti-discrimination laws, therefore, the EEOC does not act merely as a proxy for the charging party, but rather seeks to advance societal interest in preventing and remedying discrimination in the workplace.[29] Accordingly, with similar enforcement powers, under the ADA, as were vested in Title VII, the EEOC has broad power to enforce the statute's ban on disability-based discrimination.[30] The EEOC, thus, sues to vindicate the public interest, not to redress individual grievances. The validity of an individual's claim, regardless of the presence of an arbitration agreement, cannot preclude an EEOC action.[31] This subservience of individual claims to those of the EEOC is evidenced by the preemption power the EEOC possesses.[32] In addition, when the EEOC determines to sue

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25. *See General Elec.*, 532 F.2d at 373 (detailing the Congressional intent evinced through the 1972 Amendments).

26. *See* H.R. REP. No. 101-596, at 89 (1990), *reprinted in* 136 CONG. REC. H4582, 4606 (daily ed. July 12, 1990) (Joint Explanatory Statement of the Committee of Conference) ("[U]se of alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in a . . . employment contract prevent an individual from pursuing their rights under the ADA.").

27. *See Waffle House*, 193 F.3d at 809 (illustrating the intent of Congress to make the enforcement powers of the ADA superior to private remedies).

28. *See id.* at 811. The Fourth Circuit went onto document that the charging party and the EEOC have "distinct, albeit overlapping, interests for which overlapping remedies are available." *Id.*

29. *See id.*

30. *See id.* at 809 (recognizing the enforcement powers the EEOC was ordained with in order to accomplish its mission).

31. *See* EEOC v. General Elec. Co., 532 F.2d 359, 373 (4th Cir. 1976) (noting that "the standing of the EEOC to sue under Title VII cannot be controlled or determined by the standing of the charging party to sue"); *see also* EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291 (7th Cir. 1993) ("The EEOC has a right to sue independent of any private plaintiff's rights."); EEOC v. United States Steel Corp., 921 F.2d 489, 496 (3d Cir. 1990) (observing that private litigation to which the EEOC is not a party cannot preclude the EEOC from bringing its own action because private litigants are not vested with authority to represent the EEOC or its interests).

32. *See Waffle House*, 193 F.3d at 810-11 (noting that the aggrieved individual party cannot preclude the EEOC from pursuing broad based relief for the public betterment); *see*

in its own name, the Commission is not limited to the facts of the particular case.[33] Furthermore, once a claim is made with the EEOC, an individual may not withdraw that claim unless the EEOC gives its consent.[34]

b. The Federal Arbitration Act of 1925.—The Federal Arbitration Act (FAA) was originally enacted in 1925 and was recodified in its present form in 1947.[35] Congress ordained the FAA with the "purpose . . . to reverse the longstanding judicial hostility to arbitration agreements that had existed . . . and to place arbitration agreements upon the same footing as other contracts."[36] Only in the last decade has the Supreme Court expanded the role of arbitration in the resolution of legal disputes.[37]

In 1991, the Supreme Court made clear that the FAA declares a policy favoring arbitration of disputes of all kinds, including those stemming from the workplace.[38] This application of the FAA to workplace disputes seems to have escaped notice by most courts until recently.[39] Those cases, however, involved collective bargaining

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also EEOC v. United States Steel Corp., 921 F.2d 489, 496 (3d Cir. 1990) (observing that "[p]rivate litigation in which the EEOC is not a party cannot preclude the EEOC from maintaining its own action because private litigants are *not* vested with the authority to represent the EEOC" (emphasis added)). The Fourth Circuit noted that the charging party may intervene in an EEOC suit; however, they may not initiate their own suit, and intervention is permitted only if the charging party does not feel that the EEOC can adequately represent their needs as it pursues its public objectives. *Waffle House*, 193 F.3d at 810 (illustrating that this subservience is *only* applicable when the EEOC is seeking class wide relief); *see* Davis v. North Carolina Dep't of Correction, 48 F.3d 134, 138 (4th Cir. 1995) (concluding that the charging party may not proceed to federal district court until the EEOC has determined the validity of the charging party's claim).

33. *See Waffle House*, 193 F.3d at 810 (observing that "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint" are a legitimate basis for an EEOC suit (citing *General Tel.*, 446 U.S. at 331)); *see also General Elec.*, 532 F.2d at 370.

34. *See* 29 C.F.R. § 1601.10.

35. *See* 9 U.S.C. §§ 1-16 (1994).

36. Gilmer v. Interstate/Johnson Lane, Corp., 500 U.S. 20, 24 (1991) (noting this was a dispute that arose under Age Discrimination in Employment Act of 1967 (ADEA)).

37. *See* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1344 (giving a brief history and overview of prior reluctance to arbitration and the current trend in modern case law towards a preference for arbitration).

38. *See Gilmer*, 500 U.S. at 26 (noting that whether these workplace disputes are statutory or not, arbitration is still an appropriate resolution).

39. *See* Edwin S. Hopson & Mitzi D. Wyrick, *The Impact (Influence) of the Federal Arbitration Act on Litigation Over Arbitration*, 13 LAB. LAW. 359, 360 (citing the lack of judicial attention to the FAA in the 1960 trilogy of cases—*United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 594 (1960)).

agreements and the Supreme Court's indecisiveness on the applicability of the FAA to those forms of collective agreements.[40]

Outside the context of collective bargaining agreements, courts have been more unified in their approval of arbitration agreements.[41] This unity is based on the narrow reading of the exclusionary clause of the FAA which exempts certain classes of workers from arbitration agreements.[42] In addition, most courts have taken this approach because "a narrow construction of the exclusionary clause is consistent with the underlying purpose of the Act, which is to favor arbitration. The history of the treatment of the Arbitration Act by the Supreme Court of the United States reflects a clear disposition to liberalize and expand its application."[43]

The Supreme Court has determined that statutory discrimination claims can be referred to arbitration.[44] The Court stated that a judicial forum is not the only proper venue nor is it indispensable to the fair resolution of statutory discrimination claims.[45] This was distinguished from the Court's earlier decision that an arbitration agreement did not preclude an employee from vindicating their discrimination claim in a court of law.[46] The Court, however, stated that the rights involved in a collective bargaining agreement are distinct from those of an individual employee protected by discrimina-

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40. *See id.* at 361-63 (discussing the varying treatment and inconsistency among the lower courts in resolving arbitration agreements concerning discrimination statutes in collective bargaining agreements); *see also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (noting, *in dicta*, that a union cannot waive an individual's statutory rights protecting them against discrimination); *Gilmer*, 500 U.S. at 24-25 n.2 (declining to address the issue of whether section 1 excludes all contracts of employment from coverage of the FAA).

41. Hopson & Wyrick, *supra* note 39, at 363-64 n.32; *but see Waffle House*, 193 F.3d at 811 (citing *Gilmer*, 500 U.S. at 20, which held that an arbitration agreement by an individual and her employer precluded her from filing suit in a traditional judicial forum).

42. *See* Asplundh Tree Experts v. Bates, 71 F.3d 592, 600-01 (6th Cir. 1995) (holding that section 1 of the FAA [the exclusionary clause] should be construed narrowly so as not to apply to employment contracts of seamen, railroad employees, and any other class of workers involved in the movement of goods in interstate commerce); *see also* Kropfelder v. Snap-on Tools Corp., 859 F. Supp. 952, 956 (D. Md. 1994) (stating that courts have generally limited the section 1 exemption to employees closely related to the actual movement of goods in interstate commerce (citing Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971))).

43. *Asplundh*, 71 F.3d at 601.

44. *See Gilmer*, 500 U.S. at 26 (noting that the Court had recently held enforceable claims under the Sherman Act, Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act, and the Securities Act of 1933).

45. *Id.*

46. *See Alexander*, 415 U.S. at 51 (noting that this decision involved a collective bargaining agreement).

tion statutes.[47] Moreover, no agreement to arbitrate statutory claims was present in *Alexander* and additionally, the *Alexander* decision was made without guidance from the FAA.[48]

Furthermore, since the *Gilmer* decision, courts have not hesitated in finding discrimination claims subject to arbitration.[49] The zealousness to find arbitration clauses applicable to statutory discrimination claims was fueled by the language of those anti-discrimination statutes.[50] This ready acceptance of arbitration agreements has lead to the development and popularity of mandatory arbitration agreements, like the one present in *Waffle House*.[51] In response, numerous state legislatures have enacted provisions that would render these forms of arbitration agreements unenforceable.[52] The FAA, however, has been permitted to preempt state law where the state legislatures seek to limit or to disregard a valid clause in an otherwise enforceable contract.[53]

Thus, the recent fervor towards arbitration agreements, particularly mandatory agreements in the employment context, appears to

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47. *See* Wright v. Universal Maritime Service Corp., 525 U.S. 70, 80-81 (1998) (noting the distinction between an individual waiver of one's statutory discrimination protections with those rights waived by a collective bargaining agent such as a union); *see also Gilmer*, 500 U.S. at 34 (stating that this distinction is not eliminated merely because both the statute and the collective bargaining agreement were violated by the same "factual occurrence" (citing Alexander, 415 U.S. at 40-50)).

48. *Cf. Gilmer*, 500 U.S. at 38 (Stevens, J., dissenting) (discussing the FAA's liberal policy favoring arbitration agreements).

49. *See, e.g.*, Metz v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1487 (10th Cir. 1994) (finding that Title VII claims are compulsory under the FAA); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 310 (6th Cir. 1991) (holding that enforcement of an arbitration provision is not precluded by Title VII); Maye v. Smith Barney, Inc., 897 F. Supp. 100, 109 (S.D.N.Y. 1995) (finding Title VII claims arbitrable under the FAA); Cherry v. Wertheim Schroder & Co., 888 F. Supp. 830, 834 (D.S.C. 1994) (same).

50. Hopson & Wyrick, *supra* note 39, at 366 (citing the statutory provision of both Title VII and the ADA which provides, "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes" (footnote omitted)).

51. *See supra* note 2.

52. *See* Hopson & Wyrick, *supra* note 39, at 367 (citing, as an example, a Kentucky legislature's response to these agreements which provides, "no employer shall require as a condition or precondition of employment that any employee or person seeking employment . . . arbitrate . . . any provision of the Kentucky Revised Statutes or *any federal law*" (emphasis added) (footnote omitted)).

53. *See* Perry v. Thomas, 482 U.S. 483, 490-91 (1987) (holding that a California law that required certain claims to be adjudicated in a judicial forum was in direct conflict with section 2 of the FAA which evinces the strong federal policy favoring arbitration and noting under the Supremacy Clause the state law must give way); *see also* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) (holding that where contracting parties agree to arbitrate, the national policy favoring arbitration trumps a state law to the contrary).

find statutory support under the FAA.[54] The courts, therefore, have been increasingly willing to adopt these agreements as long as the parties enter into them knowingly and voluntarily.

c. Gilmer *and Its Legacy in Mandatory Arbitration Controversies.*—In *Gilmer*, the United States Supreme Court addressed the issue of whether an employee who entered into a mandatory arbitration, as part of his employment contract with a major financial institution, was bound to arbitrate his statutory discrimination claims.[55] The Court analogized the Age Discrimination in Employment Act of 1967 (ADEA)[56] with several other federal statutes and concluded that arbitration was appropriate for claims under those acts and that this decision was in accord with the federal policy favoring arbitration.[57] Thus, the Court solidified the policy of arbitrating statutory claims as long as there was no express congressional intent to the contrary.[58] This decision deviates from the aforementioned case law reflecting the Court's disdain for arbitration clauses.[59] The *Gilmer* decision provides the cornerstone for the arbitration of statutory claims and has been cited and relied upon by numerous other courts to find arbitration agreements binding.[60]

In *Equal Employment Opportunity Commission v. Kidder, Peabody & Co., Inc.*, the United States Court of Appeals for the Second Circuit addressed the same issue as in *Waffle House*, but within the context of an ADEA claim. This dispute arose from the firing of seventeen senior brokers, and the EEOC filed suit to stop this discriminatory pro-

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54. *See supra* notes 35-53 and accompanying text.

55. *Gilmer*, 500 U.S. at 23 (explaining that the arbitration clause was part of the New York Stock Exchange (NYSE) registration requirement).

56. 29 U.S.C. §§ 621-634 (1988).

57. *Gilmer*, 500 U.S. at 26 (concluding that the public policies behind the Sherman Act, 15 U.S.C. §§ 1-7, Securities Exchange Act of 1934 15 U.S.C. § 10(b), Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, and the Securities Act of 1933, 15 U.S.C. § 771(2), were equal to or greater than that of the ADEA).

58. *Id.* (noting that the burden is on the charging party to establish this intention and that this process must be tempered with the strong policy favoring arbitration kept in mind).

59. *See Alexander*, 415 U.S. at 51 (holding that an employee cannot waive prospectively their statutory rights under Title VII by means of mandatory arbitration clause); *see also* Wilko v. Swan, 346 U.S. 427, 435 (1953) (refusing to enforce an arbitration clause in a brokerage contract stating that the Securities Act of 1934 would lose effectiveness in the hands of arbitrators who lacked the legal training to resolve disputes), *overruled in part by* Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 482 (1989) (declaring that the right to a judicial forum is a procedural one and is subject to modification by an arbitration agreement).

60. *See infra* notes 61-74 and accompanying text (outlining the lower courts' acceptance and reliance upon the *Gilmer* decision).

cess.[61] The EEOC, however, only sought individual compensatory relief for the aggrieved parties.[62]

As required in the securities industry, all of the former employees had agreed to submit their claims to binding arbitration.[63] Thus, Kidder, Peabody & Co., Inc. sought to enforce the agreement that the parties had entered into, and this motion was granted by the district court.[64] The EEOC appealed this decision and the Second Circuit affirmed the lower court's holding.[65] The court in affirming the district court noted that although the EEOC and the charging party are separate and distinct entities, other courts have held consistently that the EEOC is barred from seeking specific monetary relief when the charging party has waived, settled, or previously litigated their claim.[66] This decision, therefore, is in accord with the Fourth Circuit's decision in *Waffle House* and both courts appear to be uniform in their approach that the EEOC may not seek individual relief when that individual has bound themselves to arbitration.[67]

The only other circuit to have addressed this exact issue is the United States Court of Appeals for the Sixth Circuit. In *Equal Employment Opportunity Commission v. Frank's Nursery & Crafts, Inc.*, Adams, an African-American woman, applied for a position as Executive Assistant in the company's Detroit, Michigan Facility.[68] Prior to employment, Adams was required to sign a pre-dispute arbitration agreement covering all claims associated with her employment relationship with Frank's Nursery & Crafts.[69] Approximately two years later, there was a change in management, and a new position was created that entailed similar duties and responsibilities as those held by Adams in her then

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61. *See Kidder, Peabody & Co., Inc.*, 156 F.3d at 300.

62. *See id.* (noting that Kidder had discontinued their investment banking operations, thus injunctive relief would be a moot point).

63. *See id.* (observing that the New York Stock Exchange requires, as a condition of being able to trade in their market, all licensed brokers sign a U-4 registration form that includes a pre-dispute arbitration agreement).

64. *See id.* (stating that the district court relied primarily on *Gilmer* to reach its conclusion).

65. *Id.* at 300-01 (holding that to allow the EEOC to obtain individual relief would frustrate the purpose of the FAA and thus contradict congressional intent).

66. *Id.* at 301 (citing New Orleans S.S. Ass'n v. EEOC, 680 F.2d 23, 25 (5th Cir. 1982) (barring recovery based on res judicata grounds)).

67. *See Waffle House*, 193 F.3d at 812-13; *see also Kidder, Peabody & Co.*, 156 F.3d at 301; *but see* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 455 (6th Cir. 1999) (holding that the EEOC can seek individual relief despite the submission of the claim to arbitration).

68. *Frank's Nursery & Crafts, Inc.*, 177 F.3d at 452.

69. *See id.*

current position.[70] Adams, however, was not permitted to apply for the position and then proceeded to file a complaint with the EEOC.[71] In its complaint, the EEOC sought broad injunctive relief, in addition to personal relief germane to Adams.[72] Frank's Nursery & Crafts, Inc. sought an order compelling Adams to arbitrate her Title VII claims pursuant to the terms of her employment contract.[73] On appeal, the Sixth Circuit held that the arbitration agreement did not bar the EEOC from pursuing Title VII claims for individualized monetary relief and, in addition, that the EEOC did not have to identify a class to obtain broad based equitable relief.[74]

3. The Court's Reasoning.—In *Equal Employment Opportunity Commission v. Waffle House, Inc.*, the Court of Appeals for the Fourth Circuit held that the arbitration agreement contained in the application for employment governed the employment relationship between the plaintiff employee, Mr. Baker, and Waffle House, Inc., and the clause precluded the EEOC from seeking individual remedies in a judicial forum.[75] Nevertheless, in prosecuting a suit in its own name, the court held that the EEOC cannot be compelled, by reason of an arbitration agreement between the charging party and his former employer, to arbitrate the broad class based claims permitted under the ADA.[76]

After concluding that arbitration is a matter of contract, Judge Niemeyer, writing for the majority, addressed whether the arbitration agreement in Mr. Baker's employment application governed his employment relationship with Waffle House.[77] The court disagreed with the district court's conclusion that the arbitration agreement did not apply to Mr. Baker's employment with Waffle House because Mr. Baker had completed the application at a different Waffle House other than the one at which he was ultimately employed.[78] The Fourth Circuit explained that the arbitration agreement in the em-

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70. *See id.* at 453 (explaining that the new vice president for human resources, who was white, created an executive administrative assistant and eventually filled that position with a white applicant).

71. *See id.*

72. *See id.*

73. *See id.* at 453-54.

74. *Id.* at 454-55 (stating that the EEOC did not contend, on appeal, the issue of whether the agreement was valid even though they have consistently stated that such mandatory agreements violate federal law).

75. *Waffle House*, 193 F.2d at 813.

76. *See id.* at 812.

77. *Id.* at 808.

78. *See id.*

ployment application did govern the employment relationship because the two Waffle House locations were not "legally distinct entities in this context," and the application Mr. Baker completed was the standard form application used by the Waffle House corporation, and was not germane to any particular location.[79]

The court went on to address Waffle House's contention that the EEOC, on behalf of Mr. Baker, was required to submit any employment related disputes to binding arbitration.[80] The court rejected this argument, stating that the EEOC does not merely act as a substitute for the charging party, but rather seeks to enforce a legitimate governmental interest in erasing employment discrimination.[81] To accomplish this public goal, the court noted that Congress chose to give the EEOC the same enforcement powers under the ADA as it had given it under Title VII.[82] Furthermore, the court stated that by giving the EEOC more power, Congress created a "dual system of private and governmental enforcement" with primary reliance on the EEOC to achieve equal employment opportunity.[83] The court reasoned that because of the enormity of the EEOC's public mission and Congress's intention to deem them the primary vehicle to achieve equal employment, the EEOC cannot be viewed as merely an "institutional surrogate" for individual victim's claims.[84]

The court then asserted that the statutory structure of the ADA "reflects the notion that the scope of the public interest exceeds that of the individual's interest."[85] The court pointed out that a charging party may not proceed in federal court until the EEOC has permitted them to do so.[86] In addition, if the EEOC decides to bring a suit in its own name, the charging party may not bring their own claim, and their only redress is limited to intervening in the EEOC's suit.[87] Furthermore, the court noted that once the EEOC decides to sue in its own name, it is not limited to the facts presented by the charging

79. *Id.* at 808-09.

80. *Id.* at 809 (noting Waffle House's contention that, under the FAA, it was of no consequence that the EEOC was bringing the action as opposed to Baker).

81. *Id.*

82. *Id.* (noting that because of widespread noncompliance, Congress amended Title VII in 1972 to give the EEOC the right to file suit in its own name to "eradicate discriminatory employment practices").

83. *See id.*

84. *Id.*

85. *Id.* at 110.

86. *Id.*

87. *Id.* (adding that when a private litigant brings their own suit, the court may under certain circumstances, permit the EEOC to intervene to protect the national interest).

party.[88] Finally, the court stated that the charging party may not withdraw their claim absent the EEOC's acquiescence.[89]

The *Waffle House* majority also recognized that an EEOC action is not the only avenue of relief for an injured party.[90] The court noted that private suits are still an appropriate remedy to individual grievances.[91] The court explained that the statutory framework of the ADA allows an individual to intervene in the EEOC's suit if that individual believes that the EEOC is incapable of adequately representing their needs.[92] Thus, as evidenced by the aforementioned statutory scheme, the court concluded that Congress did not intend for the EEOC and the charging party to be "interchangeable plaintiffs."[93] Instead, each party "has its own distinct, albeit overlapping interests."[94] Therefore, according to the court, in determining whether the EEOC is bound by an arbitration clause in an employee's contract, the correct approach is "to examine the related, but independent, interests of both the EEOC and the charging party to determine how an arbitration agreement signed by the charging party affects the prosecution of a claim by the EEOC."[95]

In addressing this issue, the *Waffle House* court first noted that neither the ADA nor Title VII requires the EEOC to arbitrate any claim brought before it.[96] The court also stated that neither of the two other circuits that have addressed this issue found that the EEOC is required to arbitrate.[97] The court went on to note that even the Supreme Court has implicitly rejected the notion that the EEOC is bound by a private arbitration agreement.[98] The *Waffle House* court explained that although the Supreme Court held that a private arbitration *does* bar an individual claimant from filing suit, the Court stated that this does *not* prevent the aggrieved individual from filing a charge with the EEOC.[99] The *Waffle House* court, therefore, con-

88. *Id.*

89. *Id.* (citing 29 C.F.R. § 1601.10 (1999)).

90. *Id.* (noting that Congress preserved an individual's private remedies under Title VII and therefore under the ADA).

91. *Id.*

92. *Id.*

93. *Id.* at 810-11.

94. *Id.* at 811.

95. *Id.*

96. *Id.* (explaining that Congress clearly intended for the EEOC to attempt conciliation and then, if that failed, to pursue its claim in federal court).

97. *See id.* (citing EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 462 (6th Cir. 1999); EEOC v. Kidder, Peabody & Co., Inc., 156 F.3d 298, 301-02 (2d Cir. 1998)).

98. *Id.* (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).

99. *Id.* (citing *Gilmer*, 500 U.S. at 28).

cluded that because the EEOC can accomplish societal based goals that individual claimants are incapable of realizing, and that to bind the EEOC to a private arbitration agreement would violate the statutory intent of the ADA and Title VII,[100] the EEOC cannot be compelled to arbitrate a claim because of a private agreement to do so between an employee and employer.

The *Waffle House* majority next turned to the issue of whether the EEOC could obtain reinstatement, compensatory, and punitive damages on behalf of Mr. Baker.[101] The court began by reiterating the importance of the role that the EEOC plays in eradicating workplace discrimination, but concluded that this role is not absolute.[102] The court recognized that when an individual and an employer agree to submit employment disputes to arbitration, it is the federal policy to enforce that agreement.[103] Thus, according to the majority, to allow the EEOC to prosecute Baker's *individual* claim, something that Mr. Baker could not do himself, would emasculate the strong federal policy in favor of arbitration.[104] The court noted that only a "stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done for himself" and concluded that this was not such an instance.[105] While the court recognized that the EEOC does act in the public interest even when enforcing only the charging party's claim, it noted that the public interest is significantly less when the EEOC seeks relief "specific to a charging party" rather than large scale injunctive relief.[106] Therefore, juxtaposing the competing policies of arbitration and eradicating discrimination, the court concluded that when seeking relief in its own name, the EEOC is limited by an arbitration agreement only with regard to the type of relief that it may seek.[107] When the EEOC is not a party to the arbitration agreement, however, their access to seek broad injunctive relief or their ability to institute a proceeding in federal court is not hampered or altered by a private arbitration agreement.[108]

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100. *Id.* at 811-12.

101. *Id.* at 812.

102. *Id.*

103. *Id.*

104. *Id.* (noting that Mr. Baker's own suit would be barred, in federal court, by the arbitration agreement contained in his contract for employment).

105. *Id.*

106. *Id.*

107. *Id.* at 812-13.

108. *Id.* at 813.

4. Analysis.—

a. Introduction.—In *Equal Employment Opportunity Commission v. Waffle House, Inc.*, the United States Court of Appeals for the Fourth Circuit held that the EEOC may not be compelled, by a private arbitration agreement, to arbitrate the statutory claims of a charging party, but the relief the EEOC seeks will be limited to broad injunctive relief when the charging party has entered into a valid contractual relationship with their employer to arbitrate disputes arising from their employment relationship.[109] This decision strikes a balance between the competing interests of the federal policy of promoting alternative dispute resolution and enforcing federal statutes aimed at promoting the public good. This balance is consistent with the existing policy and, moreover, is beneficial to the area of employment law.

b. The Transition Away from the Traditional Treatment of Arbitration Clauses.—Traditionally, arbitration has been met by the courts with great disdain.[110] Accordingly, Congress enacted the FAA at the behest of the American Bar Association (ABA).[111] Even though the FAA placed arbitration agreements on the same level as that of other contracts, the Supreme Court still showed some distaste towards these types of agreements.[112] Nevertheless, at present, the concept of arbitration has gained widespread judicial acceptance.[113] Accordingly, arbitration clauses have found their way into employment contracts often as a condition of employment with a particular employer.[114] They are referred to as mandatory arbitration agreements or pre-dis-

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109. *Id.* at 807.

110. *See* Jeffrey Robert White, *Mandatory Arbitration: A Growing Threat*, TRIAL, Jul. 1, 1999, at 32-36 (noting the common law hostility towards arbitration by citing examples of courts refusing to offer specific performance of arbitration awards and allowing revocation of arbitration agreements at any time prior to arbitrator's decision).

111. *See id.* at 32-33 (citing the reason for the ABA's lobbying was due to businesses requesting an alternative to judicial resolution of claims because it was argued that the courts were unfamiliar with and did not understand business practices and practicalities).

112. *See supra* note 59 and accompanying text (noting prior decisions refusing to enforce arbitration agreements).

113. *See* White, *supra* note 110, at 33 (noting recent Supreme Court holdings that evince a trend towards favoring arbitration); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 631 (1985) (declaring that the federal policy in favor of arbitrating disputes should be emphatically followed).

114. *See* Estreicher, *supra* note 39, at 1345-55 (detailing the securities industries widespread use of pre-dispute arbitration agreements as a condition to employment). Professor Estreicher also stated that the NASD, the main regulatory body in the securities industry, proposed eliminating the use of these clauses in their agreements. *Id.*; *see also* George Gunset, Securities Group Yields on Suits, CHI. TRIB., Aug. 8, 1997, § 3, at 1.

pute agreements[115] and these agreements are the farthest extension of the federal policy favoring alternative dispute resolution.[116]

The Fourth Circuit in *Waffle House* followed this strong federal policy with one notable exception: The court favored the EEOC's public mission of eradicating employment discrimination, through broad injunctive relief, over the individual arbitration agreement entered into by the charging party and his or her employer.[117] This exception suggests that arbitration has its limits, and while it can be effective for remedying individual claims, arbitration is inadequate when seeking broader, public interest goals.[118] It has been recognized, however, that arbitration of statutory employment claims can accomplish public good when addressing *individual* needs.[119] A decision, however, that a private arbitration agreement precludes the EEOC the right to vindicate the public interest would open the floodgates to widespread noncompliance and effectively render the EEOC a nonentity.[120]

The EEOC's separate role from that of the charging party has been well established in the law.[121] Thus, the fact that the charging party's avenue to redress is required to proceed through the arbitrational gambit does not bind the EEOC to follow this route.[122] In addition, the EEOC may seek injunctive relief despite some private party's

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115. *See* Beth M. Primm, Comment, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. & EMPLOYMENT L. 151, 153 (1999) (defining mandatory arbitration agreements as requiring as a term or condition of employment, that all disputes arising from employment or the termination of employment, including statutory employment discrimination claims, be resolved through mandatory, binding arbitration).

116. *See* Estreicher, *supra* note 39, at 1347 (noting the controversy surrounding the validity of "predispute agreements to arbitrate *statutory* employment claims").

117. *See Waffle House*, 193 F.3d at 812 (noting that arbitration agreements to which the EEOC are not a party cannot bind the EEOC in a suit brought in their own name).

118. *See id.* (explaining when the EEOC is pursuing large-scale injunctive relief, the public interest outweighs the federal policy favoring arbitration).

119. *Id.* at 812-13.

120. *See Waffle House*, 193 F.3d at 809 (noting widespread noncompliance prior to the amendments to Title VII, at which time the EEOC did not have authority to prosecute claims in its own name).

121. *See, e.g.*, General Tel. Co. v. EEOC, 446 U.S. at 318, 331 (1980) (noting that the EEOC is not a proxy for the charging party).

122. *Cf.* Secretary of Labor v. Fitzsimmons, 805 F.2d 682, 692 (7th Cir. 1986) (en banc) (stating that the government is not barred from maintaining an independent action asking a court to enforce a federal statute implicating both public and private interests merely because independent private litigation has also been commenced or concluded); Donovan v. Cunningham, 716 F.2d 1455, 1462 (5th Cir. 1983) (recognizing the principle that the U.S. "will not be barred from independent litigation by the failure of the private plaintiff's action" (internal quotation marks omitted) (quoting United States v. East Baton Rouge Parish Sch. Bd., 594 F.2d 56, 58 (5th Cir. 1979))); EEOC v. General Elec. Co., 532 F.2d

action that has impaired that party's own discrimination suit.[123] Furthermore, courts have recognized that the EEOC may bring a suit, in its own name, even when the injured party has settled their claim.[124] The EEOC may also bring a suit where the charging party's suit has been adversely resolved by judicial action.[125] Thus, it is apparent that the EEOC has ample authority to bring a suit to seek injunctive relief regardless of the charging party's actions.

Barring the EEOC from seeking individual compensatory relief on behalf of the charging party is also consistent with existing law. This issue, however, has only been addressed by two other courts.[126] With the two other circuit courts addressing this topic split on the appropriate outcome, the discussion turns to equitable considerations concerning the fragile employer/employee relationship.

The decision not to allow the EEOC to seek individual relief and limiting it to injunctive relief appears to be in the best interests of the employment world. As mentioned before, the EEOC has the daunting duty of eradicating workplace discrimination,[127] and it has been held that this duty can be accomplished effectively through injunctive relief.[128] The fact that arbitration has been mistrusted and it has taken so long to be accepted universally by the judiciary is an indicator of how slowly the wheels of justice turn.

The basis for this longstanding judicial hostility stems from the common law mistrust of arbitration and all of the mis-perceptions surrounding the process.[129] These misplaced, but laudable reasons for

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359, 373 (4th Cir. 1976) (observing that the EEOC's standing to sue cannot be determined or controlled by the standing of the charging party).

123. *See* EEOC v. Harris Chernin, Inc., 10 F.3d 1286, 1291-92 (7th Cir. 1993) (holding that the EEOC's right to bring a suit cannot be compromised by an individual's action impairing their own suit); Equal Employment Opportunity Comm'n v. Goodyear Aerospace, 813 F.2d 1539, 1543 (9th Cir. 1987) (same).

124. *See* EEOC v. Kimberly-Clark, Inc., 511 F.2d 1352, 1361 (1975) (stressing that because the EEOC did not agree to the charging party's settlement, the EEOC was not privy to or bound by that settlement).

125. *See Harris Chernin, Inc.*, 10 F.3d at 1292 (holding that an EEOC claim under the ADEA was not properly dismissed simply because the charging party's claim had been disposed of through summary judgment).

126. *See* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999) (holding that an arbitration agreement did not bar the EEOC from seeking either individual or class wide relief); EEOC v. Kidder, Peabody & Co., Inc., 156 F.3d 298 (2d Cir. 1998) (concluding that the EEOC was limited to seeking class based equitable relief).

127. *See Waffle House*, 193 F.3d at 809.

128. *See id.* at 812-13 (holding that the broad based relief sought by the EEOC was appropriate for judicial determination and, in addition, finding that any individual relief sought by the EEOC on behalf of Mr. Baker must be had in the arbitrational forum).

129. *See supra* notes 35-53 and accompanying text (describing the history and reason for the FAA).

the reluctance of the courts to enforce arbitration clauses were premised on two notions. The first is the idea of a general public policy argument against these forms of contractual clauses.[130] The second involves the actual physical process of arbitration and the historical problems associated with it.

c. The Public Policy Argument Regarding Arbitration Clauses.— This public policy argument against arbitration clauses first originated in the early 1950s, in the context of a sale of securities, and quickly gained widespread acceptance among the lower courts.[131] The reason for this quick acceptance was the idea that such a public issue should be addressed in a public forum as opposed to the private arbitrational arena.[132] It was not long before this approach was applied to other federal statutes.[133] Eventually, the application of this public policy exception to the enforcement of arbitration clauses found its way onto the newly enacted civil rights statutes and thus took on a new dimension.[134] Ultimately, pre-dispute arbitration agreements could not be enforced to preclude any statutory civil rights claim.[135]

Nevertheless, support for this public policy exception has waned in recent years, and the logic surrounding the exception has been

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130. *See* Primm, *supra* note 115, at 154 (noting that "for nearly thirty years after the enactment of the FAA, the court consistently applied a broad 'public policy exception' to the statutory rule of presumptively enforcing arbitration agreements").

131. *See id.* (noting that the first application of the public policy argument for refusing to enforce arbitration agreements occurred in the context of an arbitration clause in a brokerage agreement, but that the argument "gained prompt and widespread acceptance by [other] courts").

132. *See id.* (discussing the Second Circuit's decision in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 371 F.2d 821 (2d Cir. 1968)).

133. *See id.* (noting that "the reasoning underlying [the line of cases applying the public policy exception to arbitration clauses in securities and antitrust cases] was subsequently applied to reject compelled arbitration under a number of other federal statutes").

134. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60 (1974) (holding that an employee's right to a trial under Title VII is not foreclosed because of the prior submission of his claim to arbitration); *see also* Primm, *supra* note 115, at 155 (noting that twenty years after the first decision recognizing a public policy exception to the enforcement of arbitration clauses, "a separate line of civil rights cases emerged to rein in the national policy favoring arbitration").

135. *See Alexander*, 415 U.S. at 49 (holding that "Title VII's purposes and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration"). The Supreme Court, in addition, has held that rights under the Fair Labor Standards Act cannot "be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute." Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981).

refuted.[136] Even though this exception has been rejected by most courts, the EEOC has recently reiterated their adamant stance against mandatory arbitration agreements in the employment context.[137] The EEOC has taken the approach that mandatory arbitration of employment disputes is "contrary to the fundamental principles" of employment law.[138] Additionally, the EEOC believes that the federal government, or more appropriately the EEOC, should be the sole organization to enforce employment laws.[139] Unfortunately, this position has created tremendous strain between the EEOC and the judiciary with the ultimate harm coming to the employer and employee.[140]

The courts that have addressed this issue have consistently held that the public interest in obtaining individual relief is substantially less than when the EEOC seeks injunctive relief.[141] Thus, if the public interest is substantially less, and if refusing to enforce the arbitration clause would frustrate another equal, if not superior, federal policy, then it appears logical to allow the individual to seek their own redress in their chosen forum.[142]

d. Capability of Arbitrational Forum.—The arbitrational forum is as equally qualified to deal with statutory employment disputes as the courts are and in fact may be better equipped to do so.[143] The

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136. *See* Primm, *supra* note 115, at 155-56 (noting that as the legal profession became increasingly comfortable with arbitration, courts began to reject the public policy exception to enforce arbitration clauses).

137. *See* EEOC NOTICE, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (hereinafter Policy Statement) (visited Jan. 30, 2000) <http://www.eeoc.gov/docs/mandarb.txt>.

138. *Id.* at 1.

139. *See id.* at 3 (explaining that if private organizations were permitted to resolve claims it would lead to a lack of public accountability and ultimately harm the employee).

140. *See* Primm, *supra* note 115, at 160 (noting that the EEOC's position on arbitration clauses in employment contracts is "in stark opposition to the judiciary" and "the rift between the courts and the EEOC is troublesome for employers and employees alike").

141. *See* Waffle House, Inc. v. EEOC, 193 F.3d 805, 812 (4th Cir. 1999) (holding that a legally entered-into arbitration agreement can preclude the EEOC from seeking individual relief); EEOC v. Kidder, Peabody & Co., Inc., 156 F.3d 298, 300 (2d Cir. 1998) (finding that an arbitration agreement precluded any individual relief being received through an action instituted by the EEOC); *but see* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 467 (6th Cir. 1999) (concluding that a pre-dispute arbitration agreement cannot preclude the EEOC from seeking either individual or broad based relief).

142. *See Kidder, Peabody & Co., Inc.*, 156 F.3d at 300 (noting the strong policy favoring arbitration and the inconsistency that would result if the EEOC were allowed to obtain individual relief for a party who would not be otherwise able to).

143. *See* Sturner, *supra* note 24, at 465-68 (outlining the benefits of using arbitration to settle ADA claims); *see also* Primm, *supra* note 115, at 161-76 (rejecting the common myths and misnomers concerning arbitration as promulgated by the EEOC).

hostility towards arbitration is based on antiquated notions of disparate bargaining powers, biased arbitrators, insufficient discovery, and lack of written opinions to enable precedential value.[144] All of the arguments against using arbitration can be sufficiently addressed in the future by following certain guidelines.[145] These guidelines include placing no restriction on the right to file charges with the appropriate administrative agency,[146] providing a reasonable forum for arbitration,[147] having a competent arbitrator who knows the laws in question,[148] ensuring a fair and simple method for exchange of information,[149] providing a fair method of cost sharing to ensure affordable access to the system for all employees,[150] having the right to independent representation if requested by the employee,[151] requiring a range of remedies equal to those available through litigation, ensuring a written award explaining the arbitrator's rationale for the result,[152] and providing limited judicial review sufficient to ensure that the result is consistent with applicable law.[153] With these guide-

144. *See* Gilmer v. Interstate/Johnson Lane, Corp., 500 U.S. 20, 29-33 (1991) (discussing the past rationale for invalidating arbitration agreements).

145. Estreicher, *supra* note 39, at 1349-50 (arguing that "if *properly designed*, private arbitration can complement public enforcement and, at the same time, satisfy the public interest objective of various statutes governing the employment relationship" (emphasis added)).

146. *See id.* at 1349 (including this as one of the "essential [arbitration] safeguards"); *see also* EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448, 456 (6th Cir. 1999) (noting that an employee may not contract away his or her right to file a complaint because to do so would violate public policy).

147. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 388 (suggesting that employers should not be able, by means of an arbitration clause to compel claimants to litigate in a distant, inconvenient forum).

148. *See* American Arbitration Association (AAA), National Rules for the Resolution of Employment Disputes(Including Mediation and Arbitration Rules) (1997) <http://www.adr.org/rules/employment_rules.html> (visited Jan. 30, 2000) [hereinafter AAA Rules]. Rule 11(a)(i) of the AAA 1997 Rules requires that "[a]rbitrators serving under these rules shall be experienced in the field of employment law." *Id.* at 8.

149. *See* Estreicher, *supra* note 39, at 1350 (realizing that unless provided for in the contractual agreement there is no right to discovery, but also recognizing the ability of the parties to provide for an expanded method of discovery in their contract negotiations).

150. *See* White, *supra* note 110, at 34 (noting that arbitration costs can be considerable, including an initial filing fee of up to $5000 plus $350 per hour for the arbitrator, typically for 15 to 40 hours of work all required to be paid in advance).

151. *See* Estreicher, *supra* note 39, at 1360.

152. *See* AAA Rules, *supra* note 148, at 13. Rule 4 of the AAA 1997 Rules provides that "[t]he award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise." *Id.*

153. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 n.4 (1991) (stating "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statutes at issue" (internal quotation marks omitted) (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987))).

lines in place, the arbitration process can be an inexpensive, expedient, and private alternative to judicial intervention.

5. Conclusion.—In *Waffle House*, the Fourth Circuit has followed the recent and foreseeable trend in statutory employment claims.[154] This trend demonstrates the use of and preference for mandatory arbitration agreements to govern the respective rights of injured individuals. In reaching this decision, however, the court has made it clear that such arbitration agreements would not hinder the EEOC or any other governmental agency or policy from accomplishing their respective tasks.[155] In doing so, the court is merely illustrating the preference shown by the courts and legislatures for private adjudication of contractual disputes. This decision, reflective of the recent trend, is bound to refine existing case law. While it is true that the EEOC cannot be bound by a private arbitration agreement, to which it is not a party, the arbitrational forum is sufficiently capable of addressing the individual needs of those employees who have been harmed by discrimination in the workplace. Therefore, as long as an arbitration agreement is entered into voluntarily and knowingly and complies with other contractual principles, then the strong federal policy of allowing the arbitration of employment claims should persist.[156]

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154. *See generally* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (upholding the validity of an arbitration agreement found in an employment context); *see also* EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998) (enforcing the arbitration agreement as it pertains to the EEOC seeking broad equitable relief).

155. *See Waffle House*, 193 F.3d at 811-12 (holding that the EEOC could pursue a discrimination claim under the ADA without being required to submit to arbitration, despite the presence of an arbitration agreement between the employer and the charging party).

156. *Id.* at 808-09 (concluding that arbitration is a matter of contract and that all the principles of contract law apply to the applicability and validity of arbitration agreements).